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**DIVERSITY JURISDICTION
MULTI-PARTY LITIGATION
CHOICE OF LAW IN THE FEDERAL COURTS**

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
IMPROVEMENTS IN JUDICIAL MACHINERY
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SECOND CONGRESS
FIRST SESSION
ON
S. 1876
THE FEDERAL COURT JURISDICTION ACT OF 1971

PART 1

SEPTEMBER 28, 29, 30; OCTOBER 5, 6; NOVEMBER 17, 1971



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THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS

TUESDAY, SEPTEMBER 28, 1971

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL
MACHINERY OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2228, New Senate Office Building, Senator Quentin N. Burdick (Chairman of the Subcommittee) presiding.

Present, Senators Burdick, Hruska, and Gurney.

Also present: Williams P. Westphal, Chief Counsel; Michael J. Mullen, Assistant Counsel; Kathryn M. Coulter, Chief Clerk.

Senator BURDICK. The subcommittee will come to order.

Today we begin hearings on S. 1876, the Federal Court Jurisdiction Act of 1971. This bill is the result of a 10-year study of jurisdiction of Federal courts by the American Law Institute made at the suggestion of the then Chief Justice Earl Warren.

In proposing this study, Chief Justice Warren stated:

It is essential that we achieve a proper jurisdictional balance between the Federal and State court systems, assigning to each system those cases most appropriate in light of basic principles of federalism.

The American Law Institute pursued this suggestion and has produced what is to my knowledge only the third comprehensive review of Federal court jurisdiction since the inception of our lower Federal courts under the Judiciary Act of 1789.

The bill covers six broad areas of Federal jurisdiction: diversity, Federal question jurisdiction, jurisdiction of the United States as a party, admiralty jurisdiction, jurisdiction of three-judge courts, and multiparty-multistate litigation.

It will be helpful to briefly summarize the changes in the present law which would be made by the ALI recommendation in each of these six major areas:

I. Federal question jurisdiction: The bill would abolish the \$10,000 jurisdictional amount presently required and original actions could be brought based upon the existence of a federally created right regardless of the amount in controversy. The same rationale would permit removal of a case from State to Federal court if a counterclaim based on a Federal right is interposed. But where the Federal right is asserted as a defense, removal could not be had unless the amount in controversy met the \$10,000 requirement.

II. United States as party: The bill makes certain technical changes in this category of jurisdiction by clarifying the existing law relating to counterclaims and setoffs which can be asserted in an action brought by the United States. It would increase from \$10,000 to \$50,000 the jurisdiction of the district courts in Tucker Act suits based on contract

claims against the United States. Jurisdiction is also extended to any action brought against an officer or employee of the United States arising out of performance of his official duties.

III. Three-judge courts: The bill would limit the occasions when convening of a three-judge court would be required. None would be required if the issue is the constitutionality of an act of Congress. Three judges would hear a similar case involving validity of a State statute, but only if requested by the State official being sued. The circumstances when a Federal court should abstain from passing upon the constitutionality of State legislation or action is clarified.

IV. The admiralty and maritime jurisdiction of the Federal courts is not significantly changed. Rather, the bill seeks to clarify existing statutory law and codify existing case law in admiralty cases.

V. In the area of multiparty-multistate litigation, it is proposed to extend the jurisdiction of Federal courts to cover those few situations where necessary parties are not subject to the jurisdiction of any one court, but are scattered in several States, and there exists diversity of citizenship among adverse parties.

VI. Finally, diversity jurisdiction—the subject of our initial series of hearings—is one which may be the most controversial. The rationale adopted for diversity jurisdiction in this bill is that the function of this jurisdiction is to provide an even level of justice to the traveler or visitor from another State. However, when a person's involvement with a State is such as to eliminate any real risk of prejudice against him as a stranger and make it unreasonable to heed any objection he might make to the quality of its judicial system, the bill would not permit him to choose a Federal forum.

In accordance with this principle, this bill bars a plaintiff from bringing suit in Federal court in his own State simply because his opponent is a citizen of another State.

On a similar basis, a corporation or other business enterprise with a local establishment maintained for more than 2 years in a State would be prohibited from invoking, either originally or on removal, the diversity jurisdiction of a Federal court in that State in any action arising out of the activities of that establishment. Similarly, a natural person would be denied access to the Federal court in the State where he had his principal place of business or employment.

These provisions are in line with the policy of the present provision regarding removal—28 U.S.C. 1441 (b)—which does not allow removal when the defendant is a citizen of the State in which such action is brought. There is not likely to be prejudice in a court in his own State and thus the law now provides no removal. What this bill does is to treat plaintiffs the same way and deny them original diversity jurisdiction in Federal court in their own State.

The policy with regard to commuters and corporations is the same as with natural persons: that is, when they are strongly established in the State, their case as plaintiff or defendant can be heard in State court without fear of local bias.

Other provisions are designed to reinforce the prohibition against the artificial creation or destruction of diversity either by assignment or the appointment of a fiduciary.

An important change, in light of the number of cases involved, would allow an out-of-State defendant to remove an action to Fed-

eral court even though complete diversity is lacking because his co-defendants are ineligible or unwilling to remove.

In these opening hearings we will examine the general nature of the jurisdiction of Federal courts and the need for a thorough review of it. We will become acquainted with the general nature of the proposals contained in S. 1876 and their adequacy in fulfilling the proper role for the Federal courts within our Federal-State system, and we will begin in this opening set of hearings to discuss diversity jurisdiction. The subcommittee expects to share the views of many distinguished lawyers, judges, and law professors on the various provisions of this legislation.

As chairman of the subcommittee, I wish to express my deep gratitude for the excellent work of the American Law Institute in preparing this legislation now embodied in S. 1876. All of us are familiar with the excellent Restatement of the Laws prepared by the Institute. In recent years, the Institute has turned some of its energies to the drafting of model legislation including the Model Penal Code and the Model Code of Evidence. This project on the revision of jurisdiction is certainly one of its most important studies for it proposes a new design for the division of business in our court system.

In a special way, the committee is indebted to the reporters—Professors Field, Wright, Mishkin, and Shapiro—all of whom contributed to the drafting of this legislation. But really they only served to give precision and explanation to the ideas whose genesis was the excellent advisory committee of the Institute. This committee was composed of distinguished lawyers, law professors, and judges. It is regrettable that one member of the Advisory Committee who thought long and hard about the nature of the Federal court system and whose views would have benefited the subcommittee so greatly is not with us today—the late Henry Hart, professor of law at Harvard.

Professor Hart collaborated with Prof. Herbert Wechsler of the Columbia Law School, our first witness today, in a now famous casebook called “The Federal Courts and the Federal System.” Perhaps no other casebook—and this was far more than a teaching tool—has so thoroughly scrutinized the role of the courts in our system. So we are delighted this morning to have with us Professor Hart’s collaborator, Professor Wechsler.

Professor Wechsler is the director of the American Law Institute and he will explain to us the role of the Institute in developing this legislation and the process through which their work was evaluated by the council and by the Institute as a body. In his role as a professor of law, he will also be asked to give us his overall view on the adequacy of this bill as an attempt to review the principles of Federal jurisdiction in the light of modern concepts of federalism.

Before calling upon our first witness, let me say a word about the subsequent hearing schedule. Subject to the availability of a hearing room for next week, on October 5 and 6 we have set hearings to hear witnesses who have different views on diversity jurisdiction. We will later schedule hearings on each of the other major areas covered by this bill, at which time those proposals will be explored in detail.

At this time the bill, S. 1876, is incorporated into the record and the sectional analysis of the bill which appeared in my statement introducing the bill shall be printed in the appendix to this hearing record.

(S. 1876 and the sectional analysis of the bill follows:)

92D CONGRESS
1ST SESSION

S. 1876

IN THE SENATE OF THE UNITED STATES

MAY 14, 1971

Mr. BURDICK introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for the division of jurisdiction between State and Federal courts, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Federal Court Jurisdic-
4 tion Act of 1971".

5 SEC. 2. (a) That section 132 of title 28, United States
6 Code, is amended by adding at the end thereof the following
7 new subsection:

8 “(d) Actions or proceedings pending at the time of the
9 creation of a new district or transfer of a county or territory
10 from one district to another may be tried in the district as it
11 existed at the institution of the action or proceeding, or in

1 the district so created or to which the county or territory is
2 so transferred as the parties shall agree or the court direct.”

3 (b) Section 451 of such title is amended—

4 (1) by inserting before “As used in this title:” the
5 designation “(a)”; and

6 (2) by adding at the end thereof the following new
7 subsection:

8 “(b) As used in section 1305, 1306, 1315, 1318, 1327,
9 2363, and 2374 of this title, ‘district court’ includes the
10 United States District Court for the District of the Canal
11 Zone, and the District Courts of Guam and the Virgin
12 Islands, and ‘district’ includes the territorial jurisdiction of
13 those courts.”

14 (c) (1) Section 1253 of such title is repealed.

15 (2) The analysis of chapter 81 is amended by striking
16 out item 1253.

17 (d) Section 1292 of such title is amended—

18 (1) by striking out the period at the end of para-
19 graph (4) of subsection (a) thereof and inserting in
20 lieu thereof a semicolon, and by inserting immediately
21 below that paragraph the following new paragraph:

22 “(5) Orders remanding cases to the State court from
23 which they were removed pursuant to section 1312 (c) of
24 this title and orders under section 1376 (a) of this title, not
25 otherwise appealable under section 1291 of this title, deny-

1 ing requests for district courts of three judges or dissolving
2 such courts, if the appeal is taken within ten days after the
3 order.”; and

4 (2) by adding at the end of section 1292 the fol-
5 lowing new subsections:

6 “(c) If a district judge, in making an order of remand
7 to a State court under section 1382 (f) or 1384 (a) of this
8 title, or staying an action in the district court under section
9 1305 (b) or 2373 (e) of this title, or refusing to dissolve such
10 a stay, shall be of the opinion that the order involves a sub-
11 stantial question as to which there is sufficient ground for
12 difference of opinion to warrant an appeal, he shall so state
13 in writing in such order. The court of appeals may there-
14 upon, in its discretion, permit an appeal to be taken from
15 such order, if application is made to it within ten days after
16 the entry of the order. Further pre-trial proceedings in the
17 district court need not be stayed pending any appeal under
18 this subsection.

19 “(d) The court of appeals shall have jurisdiction of
20 applications for leave to appeal, as provided in section
21 1313 (d) of this title, from orders of remand to the State
22 court of claims under State law remaining after disposition
23 of the federal claim, defense, or counterclaim that is the
24 basis for jurisdiction. Such application shall be made within
25 ten days after the entry of the order.”

(e) (1) Part IV of such title is amended by striking out chapters 85, 87, and 89, and inserting in lieu thereof the following new chapters:

“Chapter 84.—DISTRICT COURTS; GENERAL DIVERSITY OF CITIZENSHIP JURISDICTION

“Sec.

“1301. General diversity of citizenship jurisdiction; amount in controversy; costs.

“1302. General diversity of citizenship jurisdiction; exceptions.

“1303. Venue in original actions under general diversity of citizenship jurisdiction.

“1304. General diversity of citizenship jurisdiction; removal of actions brought in State courts.

“1305. Change of venue on motion of defendant in actions under general diversity of citizenship jurisdiction; stay.

“1306. Change of venue on motion of plaintiff in actions under general diversity of citizenship jurisdiction; dismissal or transfer for improper venue.

“1307. Parties joined or made with a purpose of invoking or defeating federal jurisdiction.

§ 1301. General diversity of citizenship jurisdiction; amount in controversy; costs

“(a) Except as provided in section 1302 of this title, the district courts shall have jurisdiction, originally or on removal, of any civil action between—

“(1) citizens of different States;

“(2) citizens of a State, and foreign states or citizens or subjects thereof; or

“(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties;

if the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs.

1 “(b) For the purposes of this section and section 1302
2 of this title—

3 “(1) A corporation shall be deemed a citizen of
4 every State and foreign state by which it has been in-
5 corporated and of the State or foreign state where it
6 has its principal place of business.

7 “(2) A partnership or other unincorporated asso-
8 ciation capable of suing or being sued as an entity in
9 the State in which an action is brought shall be deemed
10 a citizen of the State or foreign state where it has its
11 principal place of business, whether such action is
12 brought by or against such partnership or other unin-
13 corporated association or by or against any person as an
14 agent or representative thereof.

15 “(3) In any direct action by a person other than
16 the insured against the insurer on a policy or contract
17 of liability insurance, such insurer, whether incorpo-
18 rated or unincorporated, shall be deemed a citizen of
19 the State of which the insured is a citizen, as well as
20 of every State and foreign state by which the insurer
21 has been incorporated and of the State or foreign state
22 where it has its principal place of business.

23 “(4) An executor, or an administrator, or any per-
24 son representing the estate of a decedent or appointed
25 pursuant to statute with authority to bring an action

1 because of the death of a decedent shall be deemed to
2 be a citizen only of the same State as the decedent;
3 and a guardian, committee, or other like representa-
4 tive of an infant or incompetent shall be deemed to be
5 a citizen only of the same State as the person repre-
6 sented.

7 “(c) The word ‘State’, as used in this chapter, includes
8 the District of Columbia, the Comonwealth of Puerto Rico,
9 and any territory or possession of the United States.

10 “(d) If a plaintiff who files an action originally in the
11 district court asserting jurisdiction under this section is
12 finally adjudged to be entitled to recover less than the sum
13 or value of \$10,000, computed without regard to any setoff
14 or counterclaim to which the defendant may be adjudged
15 to be entitled, and exclusive of interest and costs, the dis-
16 trict court may deny costs to the plaintiff, and in addition,
17 may impose costs on the plaintiff.

18 “(e) Notwithstanding any other provision of this title,
19 if an action brought by or on behalf of any person is within
20 the jurisdiction of the district courts under subsection (a)
21 of this section, jurisdiction in that action shall also extend
22 to any claim against the same defendant if such claim (1)
23 is brought by such person on his own behalf or by or on
24 behalf of any member of his family living in the same house-

1 hold as such person, and (2) arises out of the transaction or
2 occurrence that is the subject matter of the action.

3 “(f) The district courts shall have original jurisdiction,
4 exclusive of the courts of the States, of all actions and pro-
5 ceedings against consuls or vice consuls of foreign states.

6 **“§ 1302. General diversity of citizenship jurisdiction;**
7 **exceptions**

8 “The jurisdiction of the district courts under subsection
9 (a) of section 1301 of this title shall be subject to the fol-
10 lowing exceptions:

11 “(a) No person can invoke that jurisdiction, either
12 originally or on removal, in any district in a State of which
13 he is a citizen.

14 “(b) (1) No corporation incorporated or having its
15 principal place of business in the United States, and no part-
16 nership unincorporated association, or sole proprietorship
17 having its principal place of business in the United
18 States, that has and for a period of more than two years
19 has maintained a local establishment in a State, can invoke
20 that jurisdiction, either originally or on removal, in any dis-
21 trict in that State in any action arising out of the activities
22 of that establishment.

23 “(2) The term ‘local establishment’ as used in this sub-
24 section means a fixed place of business where or in connec-
25 tion with which, as a regular part of such business, (A)

1 services are rendered or accommodations furnished to persons
2 within the State, (B) sales, delivery, or distribution of goods
3 are made to persons within the State by one regularly main-
4 taining a stock of goods or a showroom for the display of
5 samples within the State. (C) sales of insurance, securities,
6 or other intangibles, or of real property or interests therein,
7 are made to persons within the State, or (D) production or
8 processing takes place. Dealings carried on through an inde-
9 pendent commission agent, broker, or custodian do not give
10 rise to a local establishment.

11 “(3) The provisions of this subsection shall apply only
12 to entities organized or operated primarily for the pur-
13 pose of conducting a trade, investment, or other business
14 enterprise.

15 “(c) No individual citizen of the United States who
16 has and for a period of more than two years has had his
17 principal place of business or employment in a State can
18 invoke that jurisdiction, either originally or on removal, in
19 any district in that State.

20 “(d) No person can invoke that jurisdiction, either
21 originally or on removal, in any circumstances in which that
22 person, or an individual whose interests or estate that person
23 represents, would have been barred under subsection (b)
24 or (c) of this section from doing so at the time the defend-
25 ant’s acts or omissions giving rise to the claim occurred.

1 “(e) No district court shall have jurisdiction under that
2 subsection of any civil action arising under the workmen’s
3 compensation laws of any State.

4 **“§ 1303. Venue in original actions under general diver-**
5 **sity of citizenship jurisdiction**

6 “(a) Except as otherwise provided by law, a civil action
7 wherein jurisdiction is founded only on diversity of citizen-
8 ship under section 1301 of this title may be brought only in
9 a district wherein—

10 “(1) a substantial part of the events or omissions
11 giving rise to the claim occurred, or a substantial part of
12 property that is the subject of the action is situated;

13 “(2) any defendant resides, if all defendants reside
14 in the same State; or

15 “(3) any defendant resides, if no substantial part of
16 the events or omissions giving rise to the claim occurred,
17 and no substantial part of property that is the subject of
18 the action is situated, within the United States;

19 except that a defendant not resident in the United States
20 may be sued in any district.

21 “(b) For purposes of this section, a corporation shall
22 be regarded as a resident of the district where it has its prin-
23 cipal place of business and also of each district in every State
24 by which it has been incorporated if its principal place of

1 business is not in that State, and a partnership or other unin-
 2 corporated association shall be regarded as a resident of the
 3 district where it has its principal place of business.

4 “(c) An action for trespass upon or harm done to land
 5 may be brought in any of the districts specified in sub-
 6 section (a) of this section.

7 **“§ 1304. General diversity of citizenship jurisdiction; re-**
 8 **moval of actions brought in State courts**

9 “(a) Any civil action brought in a State court against
 10 a single defendant, of which the district courts have juris-
 11 diction founded on diversity of citizenship under section
 12 1301 of this title, may be removed by the defendant to the
 13 district court for the district embracing the place where
 14 such action is pending unless his invocation of removal
 15 jurisdiction of that district court is prohibited by section
 16 1302 of this title.

17 “(b) Any defendant or third-party defendant who
 18 would have been able to remove under subsection (a) of
 19 this section if sued alone by any party making claim against
 20 him in the State court action may remove the entire action
 21 to the district court. A person impleaded as a third-party
 22 defendant in the State court action, however, may not re-
 23 move if, with respect to the claims made against them, he
 24 and the defendant who impleaded him are both insured by
 25 the same liability insurer or stand in any relationship of em-

1 ployer and employee or liability insurer and insured. The
2 district court may in its discretion remand all matters that
3 considered separately, would not be within its jurisdiction.
4 Upon request made within twenty days after any such
5 order by the party or parties who removed the action, all
6 remaining matters shall also be remanded.

7 “(c) A counterclaim asserted in a State court shall be
8 deemed an action for the purposes of this section and may
9 be removed by a plaintiff in the State court action if as a
10 defendant he would have been able to remove under sub-
11 section (a) or (b) of this section. A third party impleaded
12 on such a counterclaim may remove if he would have been
13 able to remove if impleaded as a third party defendant
14 under subsection (b) of this section. If the counterclaim
15 arises out of the same transaction or occurrence as the
16 plaintiff’s claim in the State court, the entire action shall
17 be removed; otherwise, the counterclaim shall be severed
18 and separately removed.

19 “(d) If a party would be barred from removing an
20 action in a State court under this section solely because
21 the amount claimed against him in the State court action
22 is insufficient to satisfy jurisdictional requirements, he may
23 remove the action for the purpose of asserting in the dis-
24 trict court a claim that he has against another party aris-
25 ing out of the same transaction or occurrence as the claim

1 against him and in which the matter in controversy exceeds
2 the sum or value of \$10,000, exclusive of interest and costs.
3 A statement of the proposed claim shall be included in any
4 petition for removal under this subsection.

5 **“§ 1305. Change of venue on motion of defendant in**
6 **actions under general diversity of citizenship**
7 **jurisdiction; stay**

8 “(a) For the convenience of parties and witnesses or
9 otherwise in the interest of justice, a district court in an
10 action wherein jurisdiction is founded only on diversity of
11 citizenship under section 1301 of this title may on motion
12 of any defendant transfer the action to any other district.
13 The exercise of discretion by the district court on such a
14 motion is not reviewable on appeal or otherwise.

15 “(b) (1) Notwithstanding the provisions of subsection
16 (a) of this section, an action shall not be transferred to any
17 district in which both one or more plaintiffs and all moving
18 defendants would be barred under section 1302 of this title
19 from invoking federal jurisdiction, and if the court finds
20 that there is no other place in which trial would be appro-
21 priate, it shall stay the proceedings if it can do so on such
22 terms as will assure the plaintiffs an opportunity to main-
23 tain suit upon the claim in an appropriate State court. Any
24 such stay may be conditioned on amenability of all defend-

1 ants, by consent or otherwise, to jurisdiction over the per-
2 son in an appropriate court of a designated State, on waiver
3 of any applicable statute of limitations if the stayed action
4 was timely brought, and on such other terms as the court
5 may deem proper.

6 “(2) An attachment, garnishment, or like remedy, ob-
7 tained in the stayed action for the purpose of securing satis-
8 faction of the judgment ultimately to be entered, shall be
9 preserved and made available to the plaintiff in aid of execu-
10 tion of any judgment on the claim in a State court. Any
11 such attachment, garnishment, or like remedy shall be dis-
12 solved upon a showing that no other action on the claim
13 has been brought in a State court within a period of six
14 months after the stay of proceedings in the district court.

15 “(3) Except as provided in section 1292 (c) of this
16 title, the decision of a district court staying proceedings or
17 refusing to dissolve a stay under this section shall not be
18 reviewable on appeal or otherwise.

19 “(c) To the extent that the court ordering the transfer
20 would have been obliged to apply the law of a particular
21 State, including rules with respect to refusal to adjudicate
22 the merits of the controversy and rules for selecting the
23 applicable rules of decision, the court to which the action
24 is transferred shall apply the law of that State.

1 **“§ 1306. Change of venue on motion of plaintiff in actions**
2 **under general diversity of citizenship jurisdic-**
3 **tion; dismissal or transfer for improper venue**

4 “(a) If the venue of an action wherein jurisdiction is
5 founded only on diversity of citizenship under section 1301
6 of this title is properly laid, the court on motion of all plain-
7 tiffs may, for the convenience of parties and witnesses or
8 otherwise in the interest of justice, transfer the action to any
9 district in which the venue would be proper for an orig-
10 inal action and the defendants amenable to process, other
11 than a district in which one or more plaintiffs could not
12 invoke that jurisdiction by reason of section 1302 of this
13 title. The exercise of discretion by the district court on such
14 a motion is not reviewable on appeal or otherwise.

15 “(b) If the venue of an original action wherein jurisdic-
16 tion is founded only on diversity of citizenship under section
17 1301 of this title is laid in the wrong district, the court shall
18 on motion transfer the action to any district in which the
19 venue would be proper and the defendants amenable to proc-
20 ess, other than a district in which one or more plaintiffs could
21 not invoke that jurisdiction by reason of section 1302 of this
22 title, or, if it be in the interest of justice, dismiss the action.
23 The exercise of discretion by the district court on such a mo-
24 tion is not reviewable on appeal or otherwise.

25 “(c) To the extent that a district court is obliged to

1 apply the law of a particular State, including rules with
2 respect to refusal to adjudicate the merits of a controversy
3 and rules for selecting the applicable rule of decision, the
4 court to which an action is transferred under this section
5 shall apply the same law that it would have applied had the
6 action been commenced in that court.

7 “(d) In transferring any action under this section, the
8 court may make such order for the payment of costs, includ-
9 ing reasonable attorney’s fees, as it deems proper to com-
10 pensate defendants for any expenses attributable to the failure
11 to commence the action in the court to which it is being
12 transferred, and may also stay the transfer pending compli-
13 ance with the order.

14 **“§ 1307. Parties joined or made with a purpose of invoking**
15 **or defeating Federal jurisdiction**

16 “(a) A district court shall not have jurisdiction of a
17 civil action in which any party has been made or joined
18 improperly, or collusively, or pursuant to agreement or
19 understanding between opposing parties, in order to invoke
20 the jurisdiction of such court.

21 “(b) Whenever an object of a sale, assignment, or other
22 transfer of the whole or any part of any interest in a claim
23 or other property has been to enable or to prevent the in-
24 voking of Federal jurisdiction under this chapter, chapter
25 159, or chapter 160 of this title, jurisdiction of a civil action

1 shall be determined as if such sale, assignment or other
 2 transfer had not occurred. The word 'transfer' as used in
 3 this section includes the appointment of a trustee, receiver,
 4 or other fiduciary, or of any other person to hold or receive
 5 interests of any kind, whether made by private persons or
 6 by a court or other official body.

7 **"Chapter 85.—DISTRICT COURTS; GENERAL FED-**
 8 **ERAL QUESTION JURISDICTION**

"Sec.

"1311. General Federal question jurisdiction; original jurisdiction; exclu-
 sive jurisdiction.

"1312. General Federal question jurisdiction; removal of actions brought
 in State courts.

"1313. General Federal question jurisdiction; scope of the action; pendent
 jurisdiction.

"1314. General Federal question jurisdiction; venue and process.

"1315. General Federal question jurisdiction; change of venue.

9 **"§ 1311. General Federal question jurisdiction; original**
 10 **jurisdiction; exclusive jurisdiction**

11 " (a) Except as otherwise provided by Act of Congress,
 12 the district courts shall have original jurisdiction without
 13 regard to amount in controversy of all civil actions, includ-
 14 ing those for a declaratory judgment, in which the initial
 15 pleading sets forth a substantial claim arising under the
 16 Constitution, laws, or treaties of the United States.

17 " (b) The jurisdiction of the district courts shall be
 18 exclusive of the courts of the States in actions and proceed-
 19 ings under title 11 except as otherwise there provided, in
 20 actions under the patent or copyright laws of the United

1 States, in actions under the antitrust laws authorized by
2 sections 15 or 26 of title 15, and in actions on bonds of
3 contractors for public buildings or works authorized by sec-
4 tion 270b of title 40. In all other actions within subsection
5 (a) of this section, jurisdiction of the district courts shall
6 be concurrent with the courts of the States.

7 **“§ 1312. General Federal question jurisdiction; removal**
8 **of actions brought in State courts**

9 “(a) Except as otherwise provided by Act of Congress,
10 a civil action brought in a State court may be removed to
11 the district court of the United States for the district embrac-
12 ing the place where such action is pending—

13 “(1) without regard to amount in controversy, by
14 any defendant against whom a claim is asserted on which
15 an action might have been brought in a district court
16 under section 1311 of this title;

17 “(2) if the amount in controversy exceeds the sum
18 or value of \$10,000, exclusive of interest and costs, by
19 any defendant, or any plaintiff, by or against whom,
20 subsequent to the initial pleading, a substantial defense
21 arising under the Constitution, laws, or treaties of the
22 United States is properly asserted that, if sustained,
23 would be dispositive of the action or of all counterclaims
24 therein;

1 “(3) without regard to amount in controversy, by
2 any defendant properly asserting a counterclaim com-
3 pulsory under State law or by any party against whom
4 a counterclaim is asserted, if the counterclaim sets forth
5 a substantial claim arising under the Constitution, laws,
6 or treaties of the United States.

7 “(b) The following civil actions shall not be removed
8 under subsection (a) of this section from a State court to
9 any district court of the United States:

10 “(1) actions by an employee to recover wages
11 under section 216 of title 29;

12 “(2) actions against a railroad or its receivers or
13 trustees under sections 51 through 60 of title 45;

14 “(3) actions for injury to or death of a seaman
15 under section 688 of title 46;

16 “(4) actions against a common carrier on its
17 receivers or trustees to recover damages for delay, loss,
18 or injury of shipments, under section 20 of title 49;

19 “(5) actions arising under the workmen’s compen-
20 sation law of any State;

21 “(6) actions brought by a State or a subdivision
22 thereof, or an officer or agency of a State or subdivision
23 thereof, to enforce the constitution, statutes, ordinances,
24 or administrative regulations of such State or subdivision

1 or actions against a State, subdivision, or officer to re-
2 quire such enforcement;

3 “(7) actions for the condemnation of private prop-
4 erty under State law or for the award of compensation
5 therefor;

6 “(8) actions in which the only ground for removal
7 is the defense that the defendant could not constitu-
8 tionally be subject to process of the courts of the State;

9 “(9) actions in which the only ground for removal
10 is the claim that the suit or relitigation of an issue in
11 the suit is barred by an adjudication from another
12 court that the Constitution or laws of the United States
13 require the State court to honor or that the Constitu-
14 tion or laws of the United States require or forbid
15 recourse to the laws of a particular State.

16 “(c) Any civil action or criminal prosecution com-
17 menced in a State court against any person who is denied
18 or cannot enforce in the courts of such State a right under
19 any law providing for the equal civil rights of citizens of
20 the United States, or of all persons within the jurisdiction
21 thereof, or against any person for refusing to do any act
22 on the ground that it would be inconsistent with such law,
23 may be removed by the defendant to the district court of

1 the United States for the district embracing the place where
2 such action is pending.

3 “(d) Except as provided in section 1315 of this title,
4 any civil action of which the district courts of the United
5 States have exclusive jurisdiction under section 1311 (b) of
6 this title, if brought in a court of a State, may be removed by
7 any party to the district court of the United States for the
8 district embracing the place where the action is pending, and
9 any civil action brought in a district court of the United
10 States though not within the original jurisdiction thereof, in
11 which the defendant or defendants assert a defense or coun-
12 terclaim sufficient for removal under subsection (a) (2) or
13 (a) (3) of this section, shall proceed in the district court as
14 if properly removed thereto.

15 **“§ 1313. General Federal question jurisdiction; scope of**
16 **the action; pendent jurisdiction**

17 “(a) In any case commenced in or removed to a district
18 court of the United States under section 1311 or 1312 of this
19 title, if jurisdiction over defendants has been obtained by
20 service of process within the State where the district court
21 is held or, as authorized by State or federal law, without the
22 State, the court shall have jurisdiction to determine all claims
23 arising under State law that arise out of the same transaction
24 or occurrence or series of transactions or occurrences as the
25 federal claim, defense, or counterclaim, if such a determina-

tion is necessary in order to give effective relief on the Federal claim or counterclaim or if a substantial question of fact is common to the claims arising under State law and to the federal claim, defense, or counterclaim.

“(b) In any case removed to a district court of the United States under section 1312 of this title, the district court shall remand to the State court all claims not within its jurisdiction as defined in subsection (a) of this section.

“(c) In any case commenced in a district court of the United States under section 1311 of this title, in which claims arising under State law remain pending after disposition of the federal claim that is the basis for jurisdiction, the district court shall have discretion either to adjudicate the remaining State claims, or, if it finds that determination of such claims in a State court is in the interest of justice and not prejudicial to the parties, to dismiss the State claims.

“(d) In any case removed to a district court of the United States under section 1312 of this title, in which claims arising under State law remain pending after disposition of the federal claim, defense, or counterclaim that is the basis for jurisdiction, the district court shall have discretion either to adjudicate the remaining State claims, or, if it finds that determination of such claims in a State court is in the interest of justice and not prejudicial to the

1 parties, to remand the case to the State court. An order of
 2 remand shall be stayed for ten days during which period
 3 application may be made to the court of appeals, pursuant
 4 to section 1292 (d) of this title, for leave to appeal the dis-
 5 position of the federal claim, defense, or counterclaim, and,
 6 if such application is made, the remand order shall be fur-
 7 ther stayed until the application is disposed of by the court
 8 of appeals. The decision of the district court, or, if appellate
 9 review has been allowed, of the court of appeals or Supreme
 10 Court, shall be controlling with regard to the federal claim,
 11 defense, or counterclaim in further proceedings in the State
 12 court after remand, but may be considered by the Supreme
 13 Court on review of the State court's decision.

14 **“§ 1314. General Federal question jurisdiction; venue and**
 15 **process**

16 “(a) Except as otherwise provided by law, a civil ac-
 17 tion in which jurisdiction is founded on section 1311 of this
 18 title may be brought only in a district wherein—

19 “(1) a substantial part of the events or omissions
 20 giving rise to the claim occurred, or a substantial part
 21 of property that is the subject of the action is situated;

22 “(2) any defendant resides, if all defendants reside
 23 in the same State; or

24 “(3) any defendant may be found, if there is no

14 district within the United States in which the action
15 may otherwise be brought under this subsection.

16 “(b) For purposes of this section, a corporation shall be
17 regarded as a resident of the district where it has its prin-
18 cipal place of business and also of each district in every
19 State by which it has been incorporated if its principal
20 place of business is not in that State, and a partnership or
21 other unincorporated association shall be regarded as a
22 resident of the district where it has its principal place of
23 business.

24 “(c) An action for trespass upon or harm done to land
25 may be brought in any of the districts specified in subsec-
14 tion (a) of this section.

15 “(d) In civil actions in which jurisdiction is founded on
16 section 1311 of this title, service of process upon any defend-
17 ant may be made in any district.

18 **“§ 1315. General Federal question jurisdiction; change of**
19 **venue**

20 “(a) In an action pending in a district where venue is
21 proper under section 1312 or section 1314 of this title, a
22 district court may, on motion of any party, transfer the
23 action to any other district for the convenience of parties
24 and witnesses or otherwise in the interest of justice. The

1 exercise of discretion by the district court on such a motion
2 is not reviewable on appeal or otherwise.

3 “(b) If the venue of an original action in which juris-
4 diction is founded on section 1311 of this title is laid in the
5 wrong district, or an action within the exclusive jurisdic-
6 tion of the federal courts is removed, pursuant to section
7 1312 (d) of this title, to a district in which it could not have
8 been brought, the court shall on motion transfer the action to
9 any district in which the action might have been brought
10 under section 1314 of this title, or, if it be in the interest of
11 justice, dismiss the action.

12 “(c) In transferring an action under subsection (b) of
13 this section or, on motion of plaintiff, under subsection (a)
14 of this section, the court may make such order for the pay-
15 ment of costs, including reasonable attorney’s fees, as it
16 deems proper to compensate defendants for any expenses at-
17 tributable to the failure to commence the action in the court
18 to which it is being transferred, and may also stay the trans-
19 fer pending compliance with the order.

20 **“Chapter 86.—DISTRICT COURTS; ADMIRALTY AND**
21 **MARITIME JURISDICTION**

“Sec.

“1316. Admiralty and maritime jurisdiction; original jurisdiction; exclu-
sive jurisdiction.

“1317. Admiralty and maritime jurisdiction; removal of actions brought
in State courts.

“1318. Admiralty and maritime jurisdiction; venue and process; change
of venue.

“1319. Admiralty and maritime jurisdiction; trial by jury.

1 **“§ 1316. Admiralty and maritime jurisdiction; original**
2 **jurisdiction; exclusive jurisdiction**

3 “(a) The district courts shall have original jurisdiction
4 without regard to amount in controversy of all civil actions
5 of admiralty and maritime jurisdiction. Unless otherwise
6 provided by Act of Congress, the admiralty and maritime
7 jurisdiction does not include a claim merely because it arose
8 on navigable waters.

9 “(b) The jurisdiction of the district courts under this
10 section shall be exclusive of the courts of the States in actions
11 for limitation of liability under sections 183 to 189 of title 46,
12 actions against the United States and its agencies under sec-
13 tions 741 through 749 and 781 through 789 of title 46, and
14 in actions in rem arising under the general maritime law or
15 to enforce maritime liens given by an Act of Congress or by
16 a statute of a State. In all other actions within subsection (a)
17 of this section, jurisdiction of the district courts shall be con-
18 current with the courts of the States.

19 **“§ 1317. Admiralty and maritime jurisdiction; removal**
20 **of actions brought in State courts**

21 “(a) A civil action brought in a State court that might
22 have been brought in a district court under section 1316 of
23 this title is not for that reason removable but may be removed
24 to the district court of the United States for the district em-

1 bracing the place where such action is pending if removal is
 2 authorized by subsection (b) of this section or section 1304,
 3 1312, or 1322 of this title.

4 “(b) A civil action of which the district courts of the
 5 United States have exclusive jurisdiction under section
 6 1316 (b) of this title, if brought in a court of a State, may be
 7 removed by any party to the district court of the United
 8 States for the district embracing the place where such action
 9 is pending and, except as provided in section 1315 (b) of
 10 this title, shall proceed as if properly commenced therein.

11 **“§ 1318. Admiralty and maritime jurisdiction; venue and**
 12 **process; change of venue**

13 “(a) Except as otherwise provided by law, a civil ac-
 14 tion in which jurisdiction is founded on section 1316 of this
 15 title may be brought only in a district wherein—

16 “(1) a substantial part of the events or omissions
 17 giving rise to the claim occurred; or

18 “(2) any defendant or any vessel, cargo, or other
 19 property subject to arrest or attachment may be found.

20 (b) In civil actions in which jurisdiction is founded on
 21 section 1316 of this title—

22 “(1) service of process in personam upon any de-
 23 fendant may be made in any district; and

24 “(2) service of process of arrest or attachment of
 25 a vessel, cargo, or other property may be made only in

1 the district in which the action is brought, but for pur-
2 poses of this provision, and of subsection (a) (2) of this
3 section, an arrest or attachment made on the waters of
4 a harbor, port, river, or strait that form or include the
5 boundary of a district with an adjoining district may
6 be deemed to have been made in either of such districts.

7 “(c) In civil actions in which jurisdiction is founded on
8 section 1316 of this title, the action may be transferred to
9 another district in accordance with the procedures of sec-
10 tion 1315 of this title.

11 **“§ 1319. Admiralty and maritime jurisdiction; trial by**
12 **jury**

13 “In any action commenced in or removed to a district
14 court under section 1316 or 1317 of this title, except for
15 actions for limitation of liability under sections 183 through
16 189 of title 46 and actions against the United States and its
17 agencies under sections 741 through 749 and 781 through
18 789 of title 46, any claim in personam limited to money
19 damages for personal injuries or death shall be tried by jury
20 if any party demands it. In all other actions so commenced
21 in or removed to a district court, there shall be no right to
22 jury trial unless the requirements for jurisdiction under sec-
23 tions 1301, 1302, and 1304 or sections 1311 and 1312 of
24 this title are satisfied and a right to trial by jury would exist
25 without regard to this section.

1 **“Chapter 87.—DISTRICT COURTS; UNITED STATES**

2 **AS PARTY**

“Sec.

“1321. United States as plaintiff.

“1322. United States as defendant.

“1323. Actions by or against officers of the United States.

“1324. Corporations organized under federal law; national banking associations.

“1325. Interstate Commerce Commission orders.

“1326. Venue and process.

“1327. Change of venue; transfer to cure defect of jurisdiction.

3 **“§ 1321. United States as plaintiff**

4 “(a) Except as otherwise provided by Act of Congress,
5 the district courts shall have original jurisdiction of all civil
6 actions, suits, or proceedings commenced by the United
7 States, or by any agency or officer thereof authorized by law
8 to sue.

9 “(b) In an action under subsection (a) of this section,
10 a defendant may assert as a counterclaim any claim he has
11 against the plaintiff of which the district courts would have
12 jurisdiction in an original action, or, if it arises out of the
13 transaction or occurrence that is the subject of the plain-
14 tiff's claim, any claim a defendant has against the plaintiff
15 of which any court of the United States would have jurisdic-
16 tion. A claim by a defendant against the plaintiff on which
17 suit could not otherwise be brought may be asserted to de-
18 feat the plaintiff's claim in whole or in part if it arises out of
19 the transaction or occurrence that is the subject of the plain-
20 tiff's claim, but no affirmative judgment may be given against
21 the plaintiff on such a claim.

1 **“§ 1322. United States as defendant**

2 “(a) The district courts shall have original jurisdiction:

3 “(1) Concurrent with the Court of Claims, of a
4 civil action or claim against the United States, not ex-
5 ceeding \$50,000 in amount, if such civil action or claim
6 is founded either upon the Constitution, or an Act of
7 Congress, or a regulation of an executive department, or
8 upon an express or implied contract with the United
9 States, or for liquidated or unliquidated damages not
10 sounding in tort;

11 “(2) Concurrent with the Court of Claims, of a
12 civil action against the United States for the recovery
13 of an internal revenue tax alleged to have been erro-
14 neously or illegally assessed or collected, or a penalty
15 claimed to have been excessive or in any manner wrong-
16 fully collected under the internal revenue laws;

17 “(3) Of a civil action for money damages for tort
18 as authorized by chapter 171 of this title;

19 “(4) Of any other civil action or claim on which
20 the United States has consented to be sued in a district
21 court.

22 “(b) A civil action brought in a State court in which
23 the United States or an agency thereof is named as a de-
24 fendant may be removed by the United States or the agency
25 to the district court of the United States for the district

1 embracing the place where such action is pending, and shall
2 proceed to judgment there as if it had been brought in a
3 district court.

4 “ (c) In any action under this section the United States
5 may assert as a counterclaim any claim or demand it has
6 against any plaintiff to the action. The plaintiff may respond
7 to a counterclaim by the United States in accordance with
8 section 1321 (b) of this title as if the counterclaim were the
9 subject of an original action.

10 **“§ 1323. Actions by or against officers of the United States**

11 “ (a) The district courts shall have original jurisdiction
12 of any civil action commenced by a present or former offi-
13 cer or employee of the United States to recover damages
14 for injury to his person or property on account of an act
15 done by him under color of his office or in the perform-
16 ance of his official duties.

17 “ (b) The district courts shall have original jurisdiction
18 of any action in the nature of mandamus to compel an
19 officer or employee of the United States or an agency
20 thereof to perform a duty owed to the plaintiff.

21 “ (c) A civil action or criminal prosecution brought in
22 a State court against a present or former officer of the
23 United States or an agency thereof; or a person acting
24 under such officer or agency, or a member of the armed
25 forces of the United States, for an act done under color of

1 such office or in performance of his official duties, or on
2 account of a right, title, or authority claimed under an Act
3 of Congress, may be removed by any such officer or person
4 to the district court of the United States for the district
5 embracing the place where such action is pending.

6 **“§ 1324. Corporations organized under Federal law; na-**
7 **tional banking associations**

8 “(a) The district courts shall have jurisdiction of a civil
9 action by or against a corporation upon the ground that it
10 was incorporated by or under an Act of Congress only if the
11 United States is the owner of the corporation or a majority
12 interest therein.

13 “(b) The district courts shall have original jurisdiction
14 of any action by a national banking association to enjoin
15 the Comptroller of the Currency, or to enjoin a receiver
16 acting under his direction, and of any civil action to wind
17 up the affairs of any such association.

18 **“§ 1325. Interstate Commerce Commission orders**

19 “(a) Except as otherwise provided by Act of Congress,
20 the district courts shall have jurisdiction of any civil action
21 to enforce, enjoin, set aside, annul, or suspend, in whole or
22 in part, any order of the Interstate Commerce Commission.

23 “(b) When a district court or the Court of Claims refers
24 a question or issue to the Interstate Commerce Commission
25 for determination, the court that referred the question or

1 issue shall have exclusive jurisdiction of a civil action to
2 enforce, enjoin, set aside, annul, or suspend, in whole or in
3 part, any orders of the Interstate Commerce Commission
4 arising out of such referral. Any such action shall be com-
5 menced within 90 days from the date that the order of the
6 Interstate Commerce Commission becomes final.

7 **“§ 1326. Venue and process**

8 “(a) Except as otherwise provided by Act of Congress,
9 a civil action in which jurisdiction is founded on this chapter
10 may be brought only in a district wherein—

11 “(1) a substantial part of the events or omissions
12 giving rise to the claim occurred, or a substantial part
13 of property that is the subject of the action is situated;

14 “(2) any defendant other than the United States
15 resides;

16 “(3) any plaintiff, other than the United States or
17 an officer or agency thereof, resides, if all plaintiffs reside
18 in the same state; or

19 “(4) any defendant may be found, if there is no
20 district within the United States in which the action may
21 otherwise be brought under this subsection.

22 “(b) For purposes of this section, a corporation shall be
23 regarded as a resident of the district where it has its principal
24 place of business and also of each district in every State by
25 which it has been incorporated if its principal place of busi-

1 ness is not in that State, and a partnership or other unincor-
2 porated association shall be regarded as a resident of the
3 district where it has its principal place of business. An officer
4 of the United State whose official station is at the seat of
5 government shall be regarded as a resident of the District of
6 Columbia.

7 “(c) An action for trespass upon or harm done to land
8 may be brought in any of the districts specified in subsec-
9 tion (a) of this section.

10 “(d) A civil action in rem may be brought only in a
11 district in which the property involved is located in whole
12 or in part.

13 “(e) A civil action brought under section 1322 (a) (2)
14 of this title shall be brought only in the judicial district in
15 which the plaintiff resides or in the judicial district in
16 which is located the office to which was made the return of
17 the tax in respect of which the claim is asserted, or, if no
18 return was made, in the judicial district for the District of
19 Columbia.

20 “(f) A civil action brought under section 1324 (b) of
21 this title shall be brought only in the judicial district where
22 the association is located.

23 “(g) Except as otherwise provided by law, a civil action
24 brought under section 1325 (a) of this title shall be brought

1 only in the judicial district wherein is the residence or prin-
2 cipal office of any of the parties bringing such action.

3 “(h) In an action in which jurisdiction is founded on
4 this chapter, service of process upon any defendant may be
5 made in any district.

6 **“§ 1327. Change of venue; transfer to cure defect of**
7 **jurisdiction**

8 “(a) In an action pending in a district where venue is
9 proper under section 1322 (b), 1323 (c), or 1326 of this
10 title, a district court may, on motion of any party, transfer
11 the action to any other district for the convenience of parties
12 and witnesses or otherwise in the interest of justice. The
13 exercise of discretion by the district court on such a motion
14 is not reviewable on appeal or otherwise.

15 “(b) If the venue of an original action in which juris-
16 diction is founded on this chapter is laid in the wrong
17 district, or an action within the exclusive jurisdiction of the
18 federal courts is removed pursuant to section 1322 (b) or
19 1323 (c) of this title to a district in which it could not
20 have been brought, the court shall on motion transfer the
21 action to any district in which the action might have been
22 brought under section 1326 of this title, or, if it be in the
23 interest of justice, dismiss the action.

24 “(c) If a case to which the United States or an officer
25 or agency thereof is a party is filed in a court of the United

1 States but is within the exclusive jurisdiction of any other
 2 court of the United States, the court in which it is filed
 3 shall, if it be in the interest of justice, transfer such case to
 4 the court having exclusive jurisdiction thereof, where the
 5 case shall proceed as if it had been filed in that court on the
 6 date it was originally filed.

7 **“Chapter 88.—STAYS IN CERTAIN CASES; THREE-**
 8 **JUDGE COURTS**

“Sec.

“1371. Abstention and stays in certain cases.

“1372. Stay of State court proceedings.

“1373. Stay of Federal court proceedings.

“1374. Three-judge court; when required.

“1375. Three-judge court; composition; procedure.

“1376. Three-judge court; appellate review.

9 **“§ 1371. Abstention and stays in certain cases**

10 “(a) A district court shall stay any action to enjoin.
 11 suspend, or restrain the assessment, levy, or collection of
 12 any tax under State law, or for a declaratory judgment with
 13 regard thereto, if a plain, speedy, and efficient remedy may
 14 be had in the courts of such State.

15 “(b) A district court shall stay any action to enjoin.
 16 suspend, or restrain the operation of, or compliance with,
 17 any order of an administrative agency of a State, or a
 18 political subdivision thereof, or for a declaratory judgment
 19 with regard thereto, if—

20 (1) the order affects rates chargeable by a public
 21 utility, or the conservation, production, or use of min-
 22 erals, water, or other like natural resource of the State,

1 (2) the order has been made after reasonable not-
2 ice and hearing,

3 (3) a plain, speedy, and efficient remedy may be
4 had in the courts of such State, and

5 (4) the power of the State to make such order has
6 not been superseded by any Act of Congress or admin-
7 istrative regulation thereunder.

8 “(c) A district court may stay an action, otherwise
9 properly commenced in or removed to a district court under
10 this title, on the ground that the action presents issues of
11 State law that ought to be determined in a State proceed-
12 ing, if the court finds (1) that the issues of State law can-
13 not be satisfactorily determined in the light of the State
14 authorities, (2) that abstention from the exercise of federal
15 jurisdiction is warranted either by the likelihood that the
16 necessity for deciding a substantial question of federal con-
17 stitutional law may thereby be avoided, or by a serious
18 danger of embarrassing the effectuation of State policies by
19 a decision of State law at variance with the view that may
20 be ultimately taken by the State court, or by other circum-
21 stances of like character, (3) that a plain, speedy, and
22 efficient remedy may be had in the courts of such State,
23 and (4) that the parties’ claims of federal right, if any,
24 including any issues of fact material thereto, can be ade-

1 quately protected by review of the State court decision by
2 the Supreme Court of the United States.

3 “(d) In all cases commenced in or removed to a district
4 court, in which stay of the action pending resort to a State
5 proceeding is required or permitted by subsection (a), (b),
6 or (c) of this section, the district court upon granting such
7 a stay shall retain jurisdiction. It may enter a temporary
8 restraining order of a preliminary injunction, or give other
9 interim relief, if such relief from the district court is neces-
10 sary to prevent irreparable harm. If the case was removed
11 to a district court, the court shall remand it to the State
12 court for determination, subject to such interim orders as
13 the district court may have made. If the State proceeding
14 proves ineffective in reaching a prompt and final disposi-
15 tion on the merits, the district court may vacate its stay
16 after hearing upon ten days’ notice served upon all parties
17 and upon the attorney general of the State, and thereafter
18 may proceed to judgment without regard to subsections (a),
19 (b), and (c) of this section. Unless the stay is vacated, the
20 action shall not proceed further in the district court and the
21 judgment of the State court shall be reviewable in the Su-
22 preme Court to the extent provided by section 1257 of this
23 title.

24 “(e) A court of the United States may certify to the

1 highest court of a State a question of State law, if (1) the
2 State has established a procedure by which its highest court
3 may answer questions certified from such court of the United
4 States, (2) the question of State law may be controlling in
5 the action and cannot be satisfactorily determined in the light
6 of the State authorities, and (3) the court expressly finds
7 that certification will not cause undue delay or be prejudicial
8 to the parties.

9 “(f) Except as provided in this section, no court of the
10 United States shall stay any action commenced in or removed
11 to a district court under this title for the purpose of obtaining
12 a decision as to the law of the State from a State court.
13 Nothing in this section, however, shall preclude a court of the
14 United States from exercising its discretion to deny equitable
15 relief or to decline to entertain an action for a declaratory
16 judgment or to continue an action until the determination of
17 a pending case in a State court in which the same issue of
18 law is involved.

19 “(g) This section is inapplicable, and the district court
20 shall proceed to judgment, in actions to redress the denial,
21 under color of any State law, statute, ordinance, regulation,
22 custom, or usage, of the right to vote or of the equal protec-
23 tion of the laws, if such denial is alleged to be on the basis
24 of race, creed, color, or national origin. This section is also
25 inapplicable, and the district court shall proceed to judg-

1 ment, in actions brought by the United States or an officer
2 or agency thereof.

3 **“§ 1372. Stay of State court proceedings**

4 “A court of the United States shall not grant an injunc-
5 tion to stay proceedings in a State court, including the en-
6 forcement of a judgment of a State court, unless such an
7 injunction is otherwise warranted, and (1) an Act of Con-
8 gress authorizes such relief or provides that other proceed-
9 ings shall cease, (2) the injunction is requested by the
10 United States, or an officer or agency thereof, (3) the in-
11 junction is necessary to protect the jurisdiction of the court
12 over property in its custody or subject to its control, (4)
13 the injunction is in aid of a claim for interpleader, (5) the
14 injunction is necessary to protect or effectuate an existing
15 judgment of the court, (6) the injunction is sought to pre-
16 serve temporarily the status quo pending determination of
17 whether this section permits grant of a permanent injunction,
18 or (7) the injunction is to restrain a criminal prosecution
19 that should not be permitted to continue either because the
20 statute or other law that is the basis of the prosecution plainly
21 cannot constitutionally be applied to the party seeking the
22 injunction or because the prosecution is so plainly discrimi-
23 natory as to amount to a denial of the equal protection of
24 the laws.

1 **“§ 1373. Stay of Federal court proceedings**

2 “A State court shall not grant an injunction to stay the
3 institution or prosecution of proceedings in a court of the
4 United States, or the enforcement of a judgment of a court
5 of the United States, unless such an injunction is otherwise
6 warranted, and (1) the injunction is necessary to protect
7 the jurisdiction of the court over property in its custody or
8 subject to its control, or (2) the injunction is necessary to
9 protect against vexatious and harassing relitigation of mat-
10 ters determined by an existing judgment of the State court
11 in a civil action.

12 **“§ 1374. Three-judge court; when required**

13 “A district court of three judges shall be convened when
14 otherwise required by Act of Congress, or when an action is
15 filed seeking an injunction or declaratory judgment against
16 a State officer (or the State or an agency thereof) on the
17 ground that his acts or threatened acts, taken under author-
18 ity of a generally applicable State statute, administrative
19 order, or constitutional provision, are contrary to the Con-
20 stitution of the United States. In those actions against a
21 State officer (or the State or an agency thereof) in which a
22 district court of three judges is not otherwise required by
23 Act of Congress, a district court of three judges shall not
24 be convened unless the defendant files a request for such a
25 court within twenty days after the pleading challenging

1 his action is served upon him, or prior to hearing on an
2 application for a preliminary injunction, whichever is
3 earlier.

4 **“§ 1375. Three-judge court; composition; procedure**

5 “In any action required to be heard and determined by
6 a district court of three judges under section 1374 of this
7 title, the composition and procedure of the court shall be
8 as follows:

9 “(a) Upon the filing of a request for three judges, the
10 judge to whom the request is presented shall, unless he
11 determines that three judges are not required, immediately
12 notify the chief judge of the circuit, who shall designate
13 two other judges, at least one of whom shall be a circuit
14 judge. The judges so designated, and the judge to whom
15 the request was presented, shall serve as members of the
16 court to hear and determine the action or proceeding.

17 “(b) If the action is against a State, or officer or agency
18 thereof, at least five days’ notice of hearing of the action
19 shall be given by registered or certified mail to the gov-
20 ernor and attorney general of the State. The hearing shall
21 be given precedence and held at the earliest practicable day.

22 “(c) A single judge may conduct all proceedings ex-
23 cept the trial, and enter all orders permitted by the rules of
24 civil procedure except as provided in this subsection. He
25 may grant a temporary restraining order on a specific find-

1 ing, based on evidence submitted, that specified irreparable
2 damage will result if the order is not granted, which order,
3 unless previously revoked by the district judge, shall remain
4 in force only until the hearing and determination by the
5 district court of three judges of an application for a pre-
6 liminary injunction. He may order stay of the action under
7 subsection (a) or (b) of section 1371 of this title. A single
8 judge shall not appoint a master, or order a reference, or
9 hear and determine any application for a preliminary or
10 permanent injunction or motion to vacate such an injunction,
11 or enter judgment on the merits. Any action of a single
12 judge may be reviewed by the full court at any time before
13 final judgment.

14 **“§ 1376. Three-judge court; appellate review**

15 “(a) The courts of appeals shall have jurisdiction to
16 review decisions of district courts denying requests for dis-
17 trict courts of three judges or dissolving such courts. Notice
18 of appeal from such an order, if not otherwise appealable
19 under section 1291 of this title, shall be filed within ten days
20 of entry of the order and the court of appeals shall expedite
21 decision of the appeal. If no timely request for three judges
22 is made when such a request is required by law, or if no
23 timely appeal is taken from the denial of such a request by
24 the district judge or from the dissolution of a district court of
25 three judges, a single judge shall have jurisdiction to hear and
26 determine the case.

1 “(b) The Supreme Court shall have jurisdiction on
 2 appeal from a decision of a district court of three judges
 3 granting or denying an injunction or declaratory judgment.
 4 If the Supreme Court determines that three judges need not
 5 have been convened, or that an appeal from a decision of a
 6 district court of three judges should otherwise have been
 7 taken to a court of appeals, the Supreme Court may remand
 8 the case to the court of appeals, which shall have jurisdic-
 9 tion to hear and determine the appeal as if it had been taken
 10 to that court in the first instance, or the Supreme Court may
 11 itself decide the appeal. If an appeal shall be taken to a court
 12 of appeals that, in the opinion of such court, should have been
 13 taken directly to the Supreme Court pursuant to this section,
 14 the court of appeals shall certify the case to the Supreme
 15 Court, which shall have jurisdiction to hear and determine the
 16 appeal as if it had been taken directly to that Court.

17 **“Chapter 89.—PROCEDURE FOR REMOVAL OF**
 18 **ACTIONS TO DISTRICT COURTS**

“Sec.

“1381. Procedure for removal.

“1382. Time for removal.

“1383. Procedure after removal generally.

“1384. Remand.

19 **“§ 1381. Procedure for removal**

20 “(a) A party or parties desiring to remove a civil
 21 action or criminal prosecution from a State court as author-
 22 ized by section 1304, 1312, 1317, 1322, 1323, or 2373 of
 23 this title shall file in the district court of the United States

1 for the district within which the case is pending a petition,
2 certified as in the case of a pleading, containing a short and
3 plain statement of the grounds that entitle him or them to
4 removal, together with a copy of all process, pleadings, and
5 orders in the action. If removal is founded on section 1304
6 of this title, the petition shall contain a denial of the exist-
7 ence of any facts that, under the provisions of section 1302
8 of this title, would bar the invocation of the jurisdiction of
9 the district court. If removal is founded on section 2373
10 of this title, the petition shall contain the statement and
11 certificate required by subsection (d) of that section.

12 “(b) After the filing of the petition the party or parties
13 removing the case shall give written notice of removal to
14 all other parties, and shall file a copy of the petition with
15 the clerk of the State court from which the case was
16 removed.

17 “(c) If removal is sought under section 1304 or section
18 1312 (a) (2) of this title, the sum demanded in good faith
19 in the State court pleading shall be deemed the value of the
20 matter in controversy, except that the petition for removal
21 may set forth the value of the matter in controversy if (1)
22 the relief demanded is not limited to a money judgment only,
23 or (2) a money judgment is sought but the State practice
24 either does not require demand for a specific sum or permits

1 recovery of damages in excess of the amount demanded in
2 the pleading.

3 **“§ 1382. Time for removal**

4 “(a) If removal of a civil action is founded on the ini-
5 tial pleading against a defendant or third-party defendant,
6 the petition for removal shall be filed as follows: (1) if the
7 initial pleading setting forth the claim for relief against the
8 removing party is required by State law to be delivered to
9 such party, through service or otherwise, then the petition
10 shall be filed within thirty days after the receipt of a copy
11 of the initial pleading, or (2) if service or delivery of the
12 initial pleading upon the removing party is not required by
13 State law, then the petition shall be filed within thirty days
14 after there have occurred both service of summons or other
15 notice upon the defendant or third-party defendant and the
16 filing of the initial pleading in court.

17 “(b) If removal of a civil action is founded on a plead-
18 ing subsequent to the initial pleading, the petition for
19 removal shall be filed within thirty days after service of the
20 pleading on which the removal is based.

21 “(c) If the case stated by an original pleading is not
22 removable and there is an amended pleading from which it
23 may first be ascertained that the case has become remov-
24 able, the party whose pleading is amended may remove on

1 the basis of that pleading only if his petition for removal is
2 filed within thirty days of service of the original pleading
3 now amended, but a party against whom the amended
4 pleading is directed may file a petition for removal within
5 thirty days of the amendment of the pleading. If the plead-
6 ing is amended during the trial or within thirty days prior
7 thereto, failure to petition for removal without undue delay
8 after amendment of the pleading is a waiver of removal.

9 “(d) If removal is sought of a case within clause (2) of
10 section 1381 (c) of this title, the petition for removal shall
11 be filed not later than thirty days after it appears in the
12 State court proceeding that damages may be awarded in
13 excess of \$10,000, exclusive of interest and costs. If it so
14 appears during the trial or within thirty days prior thereto,
15 removal may be had only if the petition alleges, and the
16 district court finds, that the party claiming damages has
17 deliberately failed to disclose the amount of damages in
18 order to defeat removal.

19 “(e) The petition for removal of a criminal prosecution
20 or of a civil action of which the courts of the United States
21 have exclusive jurisdiction may be filed at any time before
22 trial.

23 “(f) The steps required by subsection (b) of section
24 1381 of this title need not be completed within the time
25 allowed for filing the petition for removal, but the removal is

1 not effective until such steps have been taken, and the dis-
2 trict court may order remand of the case if these steps have
3 been unduly delayed.

4 “(g) Whenever a motion for dismissal or stay is made
5 in a State court on the ground of inconvenient forum, the
6 period from the making of the motion to the seventh day
7 following decision on the motion by the State trial court
8 shall be excluded in determining the time within which a
9 petition for removal must be filed.

10 **“§ 1383. Procedure after removal generally**

11 “(a) After removal is effective, the State court shall
12 proceed no further unless the case is remanded, except that
13 if removal is effected while a trial is in progress, the trial
14 may be completed in the State court, and judgment there-
15 after entered if the case is remanded.

16 “(b) In an action removed to a district court, any
17 attachment or sequestration of the goods or estate of a
18 party to the action in the State court shall hold the goods
19 or estate to answer the final judgment or decree in the same
20 manner as they would have been held to answer final judg-
21 ment or decree had it been rendered by the State court. All
22 bonds, undertakings, or security given by a party in a
23 case prior to its removal shall remain valid and effectual
24 notwithstanding the removal.

25 “(c) All injunctions, orders, and other proceedings had

1 in a case prior to its removal shall remain in full force and
2 effect unless dissolved or modified by the district court.

3 “(d) In a case removed from a State court, the dis-
4 trict court may issue all necessary orders and process to
5 bring before it all proper parties whether served by process
6 issued by the State court or otherwise. New process may be
7 issued against those not served or defectively served prior
8 to removal in the same manner as in cases originally filed
9 in the district court.

10 “(e) In a case removed from a State court, the district
11 court may require the party or parties petitioning for re-
12 moval to file with its clerk copies of all records and proceed-
13 ings in the State court or may cause the records and proceed-
14 ings to be brought before it by writ of certiorari issued to the
15 State court.

16 **“§ 1384. Remand**

17 “(a) Subject to the provisions of section 1386 of this
18 title, if at any time before final judgment it appears that a
19 case was removed improvidently and without jurisdiction,
20 the district court shall remand the case, and may order the
21 payment of just costs and a reasonable attorney’s fee.

22 “(b) If remand is ordered under subsection (a) of this
23 section or as authorized by section 1313 (d) or 1382 (f) of
24 this title, and the order has not been stayed pending an ap-
25 peal authorized by subsection (c) of this section, a certified

1 copy of the order of remand shall be mailed by the clerk of
 2 the State court, and the State court may thereupon proceed
 3 with the case.

4 “(c) An order remanding a case to the State court from
 5 which it was removed is not reviewable on appeal or other-
 6 wise, except as provided in sections 1292 (c) and 1313 (d)
 7 of this title, and except that an order remanding a case to
 8 the State court from which it was removed pursuant to
 9 section 1312 (c) of this title shall be reviewable under sec-
 10 tion 1292 (a) (5) of this title if review is sought by the
 11 taking of an appeal within ten days after the entry of the
 12 order.

13 **“Chapter 90.—RAISING AND FORECLOSURE OF**
 14 **JURISDICTIONAL ISSUES**

“Sec.

“1386. Raising of jurisdictional issues; tolling of statute of limitations.

15 **“§ 1386. Raising of jurisdictional issues; tolling of stat-**
 16 **ute of limitations**

17 “(a) After the commencement of trial on the merits in
 18 the district court, or following any prior decision of a dis-
 19 trict court that is dispositive of the merits, no court of the
 20 United States shall consider, either on its own motion or at
 21 the instance of any party, a question of jurisdiction over
 22 the subject matter of the case, unless—

23 “(1) the court is acting pursuant to a prior judi-

1 cial determination deferring the resolution of such ques-
2 tion of jurisdiction:

3 “(2) the question is raised by a party on the basis
4 of facts of which he had no knowledge, and that he
5 could not be expected to have discovered in the exer-
6 cise of reasonable diligence, at an earlier stage in the
7 proceedings, or on the basis of change in the applicable
8 law;

9 “(3) the question was not raised at an earlier stage
10 in the proceedings as a result of an attempt, by collu-
11 sion or connivance (including conscious concealment of
12 a known jurisdictional defect by two or more opposing
13 parties, whether or not accompanied by an agreement
14 between or among such parties), to confer jurisdiction
15 on the court;

16 “(4) the question arises on appeal or other review
17 or reconsideration on the record already made, of a
18 decision with respect to such question not rendered con-
19 trary to the provisions of this section, and is raised by
20 a party who has previously challenged the jurisdiction:
21 or

22 “(5) consideration of a jurisdictional defect at that
23 stage of the proceedings is required by the Constitution.

24 “(b) If any claim in an action timely commenced in a
25 federal court is dismissed for lack of jurisdiction over the

1 subject matter of the claim, a new action on the same claim
 2 brought in another court shall not be barred by a statute
 3 of limitations that would not have barred the original action
 4 had it been commenced in that court, if such new action
 5 is brought in a proper court, federal or State, within thirty
 6 days after dismissal of the original claim has become final
 7 or within such longer period as may be available under
 8 applicable State law.

9 “(c) If an action timely commenced in a State court is
 10 dismissed because jurisdiction of such action is exclusively
 11 in the courts of the United States, a new action on the same
 12 claim brought in a United States district court shall not be
 13 barred by a statute of limitations that would not have barred
 14 the original action had it been commenced in that court if
 15 such new action is brought in a proper federal court within
 16 thirty days after dismissal of the original action has become
 17 final.”

18 (2) The table of chapters of such part IV is amended
 19 to read as follows:

20 **“Part IV.—JURISDICTION AND VENUE**

“Chapter	Sec.
“81. Supreme Court.....	1251
“83. Courts of Appeals.....	1291
“84. District Courts; General Diversity of Citizenship Jurisdic- tion	1301
“85. District Courts; General Federal Question Jurisdiction.....	1311
“86. District Courts; Admiralty and Maritime Jurisdiction.....	1316
“87. District Courts; United States as Party.....	1321
“88. Stays in Certain Cases; Three-Judge Courts.....	1371
“89. Procedure for Removal of Actions to District Courts.....	1381
“90. Raising and Foreclosure of Jurisdictional Issues.....	1386”.

1 (f) Section 1695 of such title is amended to read as
2 follows:

3 **“§ 1695. Stockholder’s derivative action**

4 “If a stockholder’s action in behalf of his corporation is
5 brought in the district in which the corporation resides, proc-
6 ess may be served upon defendants other than the corpora-
7 tion in any district.”

8 (g) (1) Section 1873 of such title is repealed.

9 (2) The analysis of chapter 121 is amended by striking
10 out item 1873.

11 (h) (1) Chapter 155 of such title is repealed.

12 (2) The table of chapters of part VI of such title is
13 amended by striking out item 155.

14 (i) Chapter 159 of such title is amended to read as
15 follows:

16 **“Chapter 159.—INTERPLEADER**

“Sec.

“2361. Interpleader; original diversity of citizenship jurisdiction.

“2362. Interpleader; venue.

“2363. Interpleader; process and procedure.

17 **“§ 2361. Interpleader; original diversity of citizenship**
18 **jurisdiction**

19 “(a) The district courts shall have original jurisdiction
20 of any civil action of interpleader or in the nature of inter-
21 pleader filed by any person, firm, or corporation, associa-
22 tion, or society having in his or its custody or possession
23 money or property of the value of \$500 or more, or having

1 issued a note, bond, certificate, policy of insurance, or other
2 instrument of value of amount of \$500 or more, or providing
3 for the delivery or payment or the loan of money or property
4 of such amount or value, or being under any obligation writ-
5 ten or unwritten to the amount of \$500 or more, if—

6 “(1) two or more adverse claimants, one of whom
7 is a citizen of a state and another is a citizen or subject
8 of another territorial jurisdiction (as defined in section
9 2375 of this title), are claiming or may claim to be
10 entitled to such money or property, or to any one or
11 more of the benefits arising by virtue of any note, bond,
12 certificate, policy, or other instrument, or arising by
13 virtue of any such obligation; and

14 “(2) the plaintiff has deposited such money or
15 property or has paid the amount of or the loan or other
16 value of such instrument or the amount due under such
17 obligation into the registry of the court, there to abide
18 the judgement of the court, or has given bond payable
19 to the clerk of the court in such amount and with such
20 surety as the court or judge may deem proper, condi-
21 tioned upon the compliance by the plaintiff with the
22 future order or judgment of the court with respect to
23 the subject matter of the controversy.

24 “(b) Such an action may be entertained although the
25 titles or claims of the conflicting claimants do not have a

1 common origin, or are not identical, but are adverse to and
2 independent of one another, or although the plaintiff may
3 be independently liable to one or more of the claimants.

4 **“§ 2362. Interpleader; venue**

5 “Any civil action of interpleader or in the nature of
6 interpleader under section 2361 of this title may be brought
7 in the judicial district in which one or more of the claimants
8 reside.

9 **“§ 2363. Interpleader; process and procedure**

10 “In any civil action of interpleader or in the nature of
11 interpleader under section 2361 of this title—

12 “(a) A district court may issue its process for all
13 claimants and enter its order restraining them from institut-
14 ing or prosecuting any proceedings in any State or United
15 States court affecting the property, instrument, or obliga-
16 tion involved in the interpleader action until further order of
17 the court. Such process and order may run anywhere within
18 the territorial limits of the United States and anywhere out-
19 side those territorial limits that process of the United States
20 may reach, and shall be returnable at such time as the court
21 or judge thereof directs.

22 “(b) For the convenience of parties and witnesses or
23 otherwise in the interest of justice, a district court may, on
24 motion of any party or on its own motion, transfer the action

1 to any other district. The exercise of discretion by the district
 2 court on such a motion is not reviewable on appeal or other-
 3 wise. If the action is transferred at the same time that
 4 process is issued under this section, such process shall be
 5 made returnable in the district court for the district to which
 6 the action is transferred.

7 “(c) Whenever State law supplies the rule of decision
 8 on an issue, the district court may make its own determina-
 9 tion as to which State rule of decision is applicable.

10 “(d) The district court shall hear and determine the
 11 case, and may discharge the plaintiff from further liability,
 12 make the injunction permanent, and make all appropriate
 13 orders to enforce its judgement.”

14 (j) Part VI of such title is amended—

15 (1) by inserting after chapter 159 the following
 16 new chapters:

17 **“Chapter 160.—NECESSARY PARTIES DISPERSED**
 18 **IN DIFFERENT JURISDICTIONS**

“Sec.

“2371. Dispersed necessary parties; original diversity of citizenship juris-
 diction.

“2372. Venue in original actions under dispersed parties diversity of citi-
 zenship jurisdiction.

“2373. Dispersed parties diversity of citizenship jurisdiction; removal of
 actions brought in State courts.

“2374. Process and procedure in actions under dispersed parties diversity
 of citizenship jurisdiction.

“2375. Definitions in actions under dispersed parties and interpleader
 diversity of citizenship jurisdiction.

“2376. Dispersed necessary parties in actions in district court under other
 jurisdictional statutes.

1 **“§ 2371. Dispersed necessary parties; original diversity**
2 **of citizenship jurisdiction**

3 “(a) The district courts shall have original jurisdiction
4 of any civil action in which the several defendants who are
5 necessary for a just adjudication of the plaintiff’s claim are
6 not all amenable to process of any one territorial jurisdiction,
7 and one of any two adverse parties is a citizen of a
8 State and the other is a citizen or subject of another territorial
9 jurisdiction.

10 “(b) A defendant is necessary for a just adjudication of
11 the plaintiff’s claim, within the meaning of this chapter, if
12 complete relief cannot be accorded the plaintiff in his
13 absence, or if it appears that, under federal law or relevant
14 State law, an action on the claim would have to be dismissed
15 if he could not be joined as a party. Persons against whom
16 several liability is asserted shall not be deemed necessary for
17 a just adjudication of the plaintiff’s claim because liability is
18 asserted against them jointly or alternatively as well.

19 “(c) A person is amenable to process of a territorial
20 jurisdiction, for the purposes of this section, if, and only if,
21 that person—

22 “(1) being an individual, has his domicile or an
23 established residence or his principal place of employ-
24 ment or business activity in that jurisdiction;

25 “(2) being a corporation or other entity sued as

1 such, is incorporated or has its principal office in that
2 jurisdiction;

3 “(3) has an agent in that jurisdiction authorized
4 by appointment to receive service of process; or

5 “(4) may, under the laws of that jurisdiction, be
6 subjected to a fully effective judgment of its courts
7 without delivery of process within the territorial juris-
8 diction to such person or the agent of such person
9 authorized by appointment to receive it.

10 **“§ 2372. Venue in original actions under dispersed parties**
11 **diversity of citizenship jurisdiction**

12 “(a) A civil action wherein jurisdiction is founded solely
13 on section 2371 of this title may be brought only in a district
14 where a substantial part of the events or omissions giving rise
15 to the claim occurred or where a substantial part of property
16 that is the subject of the action is situated, except that if there
17 is no such district within the United States, the action may be
18 brought in any district where any party resides.

19 “(b) For purposes of this section, a corporation shall
20 be regarded as a resident of the district where it has its
21 principal place of business and also of each district in every
22 State by which it has been incorporated if its principal place
23 of business is not in that State, and a partnership or other
24 unincorporated association shall be regarded as a resident of
25 the district where it has its principal place of business.

“§ 2373. Dispersed parties diversity of citizenship jurisdiction; removal of actions brought in State courts

“(a) A civil action commenced in a State court in which one of more additional parties necessary for a just adjudication as to a defendant cannot be joined or with the exercise of reasonable diligence served with process or otherwise made subject to a fully effective judgment of the courts of that State, may be removed by any adversely affected defendant to the district court for the district embracing the place where such action is pending if one of any two adverse parties is a citizen of a State and the other is a citizen or subject of another territorial jurisdiction.

“In actions wherein jurisdiction is founded on this section, the word ‘parties’ as used in this chapter includes all persons named in the petition for removal as necessary for a just adjudication as to the defendant, whether or not such persons were named or joined as parties in the action in the State court.

“(b) A person is necessary for a just adjudication as to a defendant, within the meaning of this chapter, if he claims or may claim an interest relating to the property or transaction that is the subject of the action and is so situated that the disposition of the action in his absence may leave the defendant subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by

1 reason of his claimed interest. A person is not thus neces-
2 sary for a just adjudication simply because he is or may be
3 liable to a defendant for all or part of the plaintiff's claim
4 against the defendant.

5 “(c) A counterclaim asserted in a State court arising
6 out of the same transaction or occurrence as the plaintiff's
7 claim shall be deemed an action for purposes of this section,
8 and if the requirements hereof are met, the entire State
9 court action may be removed. For the purpose of deter-
10 mining whether absent persons are necessary for a just
11 adjudication of such a counterclaim, a plaintiff in the State
12 court shall be considered as a defendant under subsection
13 (b) of this section, and a defendant therein as a plaintiff
14 under subsection (b) of section 2371 of this title; for all
15 other purposes of removing such action, including the pro-
16 cedural steps therefor, original plaintiffs or defendants may
17 be deemed defendants.

18 “A counterclaim asserted in a State court that does not
19 arise out of the same transaction or occurrence as the plain-
20 tiff's claim shall be deemed an action for the purposes of
21 this section and may be removed by a plaintiff in the State
22 court action if as a defendant he would have been able to
23 remove under subsections (a) and (b) of this section.

24 “(d) A petition for removal under this section shall
25 contain a statement that every reasonable effort has been

1 made by or on behalf of the removing party to have each
2 absent person who is necessary for a just adjudication as
3 to him made a party and served with process or otherwise
4 made subject to a fully effective judgment in the State court.

5 “(e) In an action where jurisdiction is founded solely on
6 this section, if there is a State court in which an action on
7 the claim may be maintained and to whose process all parties
8 necessary for a just adjudication are answerable or agree to
9 submit, the district court on motion of any party or on its
10 own motion may stay proceedings before it pending prosecu-
11 tion of an action on the claim in the courts of that State.
12 In determining whether to stay proceedings for this purpose,
13 the district court shall take into account, in addition to the
14 convenience of parties and witnesses, whether the rules
15 for decision of the action or any substantial part thereof
16 are the laws of the State in whose courts the action would
17 be prosecuted during pendency of the stay and the reasons
18 why the action was not commenced in that State court
19 originally. The decision of a district court staying proceed-
20 ings or refusing to dissolve a stay under this subsection
21 shall not be reviewable on appeal or otherwise except as
22 provided in section 1292 (c) of this title.

23 **“§ 2374. Process and procedure in actions under dispersed**
24 **parties diversity of citizenship jurisdiction**

25 “In any action within this chapter—

1 “(a) The district court shall, except as otherwise pro-
2 vided in this section, on motion issue its process for all parties
3 necessary for a just adjudication and shall have power to re-
4 strain them until further order of the court from instituting
5 or prosecuting any proceeding in any State or United States
6 court relating to the property or transaction that is the sub-
7 ject of the action. Such process may run anywhere within
8 the territorial limits of the United States and anywhere out-
9 side those territorial limits that process of the United States
10 may reach, and shall be returnable at such times as the court
11 directs.

12 “(b) For the convenience of parties and witnesses
13 or otherwise in the interest of justice, a district court may, on
14 motion of any party or on its own motion, transfer the action
15 to any other district. The exercise of discretion by the district
16 court on such a motion is not reviewable on appeal or other-
17 wise. If the action is transferred at the same time that process
18 is issued under this section, such process shall be made re-
19 turnable in the district court for the district to which the
20 action is transferred.

21 “(c) Whenever State law supplies the rule of decision
22 on an issue, the district court may make its own determina-
23 tion as to which State rule of decision is applicable.

24 “(d) If one or more absent parties cannot be effectively
25 served with process issuing under this section, the district

1 court shall order that the action proceed without such parties
2 unless it is satisfied that greater injustice would be caused by
3 proceeding without them than by total failure of the action.

4 “(e) If the application of this section would lead to
5 undue burden on distant parties, and the adverse effect of
6 such disposition does not exceed the sum or value of \$5,000
7 for any party, the district court may in its discretion:

8 “(1) dismiss without prejudice as to any party
9 or parties upon whom process has been or would have
10 to be served outside the State where the action is to be
11 litigated, and order that the action proceed without
12 such parties; or

13 “(2) if it is satisfied that, in view of the small
14 amounts involved, greater injustice would be caused by
15 any continuation of the proceedings than by total fail-
16 ure of the action, dismiss the entire action without
17 prejudice.

18 “(f) An order that the action proceed without one or
19 more parties necessary for a just adjudication may be con-
20 ditioned upon the taking of appropriate measures, including
21 the shaping of relief or other provisions in the judgment,
22 for the protection of interests that may be affected thereby.
23 Such an order may be entered under subsection (d) or (e)
24 of this section even though under federal law or any relevant

1 State law an action on the claim could not otherwise be
2 maintained without joining the absent parties.

3 **“§ 2375. Definitions in actions under dispersed parties**
4 **and interpleader diversity of citizenship juris-**
5 **diction**

6 “For the purposes only of this chapter and of chapter
7 159 of this title—

8 “(a) a corporation incorporated by more than one
9 territorial jurisdiction shall be deemed to be a citizen
10 only of one of those jurisdictions that will establish
11 diversity of citizenship between the corporation and a
12 party adverse to it; a partnership or other unincorpo-
13 rated association shall be deemed to be a citizen of the
14 territorial jurisdiction where it has its principal place
15 of business;

16 “(b) the term ‘territorial jurisdiction’ means any
17 State or any foreign state;

18 “(c) the word ‘State’ includes the District of Co-
19 lumbia, the Commonwealth of Puerto Rico, and any
20 Territory or Possession of the United States;

21 “(d) the word ‘citizen’ includes a State or other
22 territorial jurisdiction or a subdivision thereof, but
23 nothing herein shall be construed to affect sovereign
24 immunity;

“(e) a judgment is ‘fully effective’ if it binds a party personally or operates on property within the jurisdiction of the court to an extent sufficient fully to satisfy the claim.

“§ 2376. Dispersed necessary parties in actions in district court under other jurisdictional statutes

“(a) In a civil action instituted in the district court originally under section 1301 of this title, if one or more additional parties necessary for a just adjudication as to a defendant (as defined in section 2373 of this title) cannot otherwise be joined, section 2374 of this title shall be applicable to such action; such parties may be joined under the provisions of that section without regard to their citizenship; and venue otherwise proper shall be unaffected by, and shall be proper as to, any such parties.

“(b) In a civil action wherein jurisdiction is founded solely on diversity of citizenship under section 1301 of this title, if a counterclaim compulsory under the applicable rule is asserted and one or more additional parties necessary for a just adjudication of that claim as to any present party cannot otherwise be joined, section 2374 of this title shall be applicable to such action; such parties may be joined under the provisions of that section without regard to their citizenship; and venue otherwise proper shall be unaffected by, and shall be proper as to, any such parties. A party is necessary

1 for a just adjudication of a counterclaim as to a present
 2 party, for purposes of this subsection, if he would be thus
 3 necessary, under section 2371 or 2373 of this title, in an orig-
 4 inal action on the same claim.

5 **“Chapter 160A.—MULTI-DISTRICT LITIGATION**

“Sec.

“2381. Multi-district litigation.

6 **“§ 2381. Multi-district litigation**

7 “(a) When civil actions involving one or more common
 8 questions of fact are pending in different districts, such ac-
 9 tions may be transferred to any district for coordinated or
 10 consolidated pretrial proceedings. Such transfers shall be
 11 made by the judicial panel on multi-district litigation author-
 12 ized by this section upon its determination that transfers for
 13 such proceedings will be for the convenience of parties and
 14 witnesses and will promote the just and efficient conduct of
 15 such actions. Each action so transferred shall be remanded
 16 by the panel at or before the conclusion of such pretrial
 17 proceedings to the district from which it was transferred
 18 unless it shall have been previously terminated, except that
 19 the panel may separate any claim, cross-claim, counterclaim,
 20 or third-party claim and remand any of such claims before
 21 the remainder of the action is remanded.

22 “(b) Such coordinated or consolidated pretrial pro-
 23 ceedings shall be conducted by a judge or judges to whom
 24 such actions are assigned by the judicial panel on multi-

1 district litigation. For this purpose, upon request of the
2 panel, a circuit judge or a district judge may be designated
3 and assigned temporarily for service in the transferee district
4 by the Chief Justice of the United States or the chief judge
5 of the circuit, as may be required, in accordance with the pro-
6 visions of chapter 13 of this title. With the consent of the
7 transferee district court, such actions may be assigned by the
8 panel to a judge or judges of such district. The judge or
9 judges to whom such actions are assigned, the members of the
10 judicial panel on multi-district litigation, and other circuit
11 and district judges designated when needed by the panel may
12 exercise the powers of a district judge in any district for the
13 purpose of conducting pretrial depositions in such coordinated
14 or consolidated pretrial proceedings.

15 “(c) Proceedings for the transfer of an action under this
16 section may be initiated by—

17 “(i) the judicial panel on multi-district litigation
18 upon its own initiative; or

19 “(ii) motion filed with the panel by a party in any
20 action in which transfer for coordinated or consolidated
21 pretrial proceedings under this section may be appro-
22 priate. A copy of such motion shall be filed in the district
23 court in which the moving party’s action is pending.

24 “The panel shall give notice to the parties in all actions
25 in which transfers for coordinated or consolidated pretrial

1 proceedings are contemplated, and such notice shall specify
2 the time and place of any hearing to determine whether
3 such transfer shall be made. Orders of the panel to set a
4 hearing and other orders of the panel issued prior to set a
5 order either directing or denying transfer shall be filed in
6 the office of the clerk of the district court in which a trans-
7 fer hearing is to be or has been held. The panel's order of
8 transfer shall be based upon a record of such hearing at
9 which material evidence may be offered by any party to
10 an action pending in any district that would be affected by
11 the proceedings under this section, and shall be supported
12 by findings of fact and conclusions of law based upon such
13 record. Orders of transfer and such other orders as the
14 panel may make thereafter shall be filed in the office of
15 the clerk of the district court of the transferee district and
16 shall be effective when thus filed. The clerk of the trans-
17 feree district court shall forthwith transmit a certified copy
18 of the panel's order to transfer to the clerk of the district
19 court from which the action is being transferred. An order
20 denying transfer shall be filed in each district wherein
21 there is a case pending in which the motion for transfer has
22 been made.

23 “(d) The judicial panel on multidistrict litigation shall
24 consist of seven circuit and district judges designated from
25 time to time by the Chief Justice of the United States, no

1 two of whom shall be from the same circuit. The concur-
2 rence of four members shall be necessary to any action by
3 the panel.

4 “(e) No proceedings for review of any order of the
5 panel may be permitted except by extraordinary writ pur-
6 suant to the provisions of section 1651 of this title. Peti-
7 tions for an extraordinary writ to review an order of the
8 panel to set a transfer hearing and other orders of the panel
9 issued prior to the order either directing or denying trans-
10 fer shall be filed only in the court of appeals having juris-
11 diction over the district in which a hearing is to be or has
12 been held. Petitions for an extraordinary writ to review an
13 order to transfer or orders subsequent to transfer shall be
14 filed only in the court of appeals having jurisdiction over the
15 transferee district. There shall be no appeal or review of an
16 order of the panel denying a motion to transfer for consoli-
17 dated or coordinated proceedings.

18 “(f) The panel may prescribe rules for the conduct of
19 its business not inconsistent with Acts of Congress and the
20 Federal Rules of Civil Procedure.

21 “(g) Nothing in this section shall apply to any action
22 in which the United States is a complainant arising under
23 the antitrust laws. ‘Antitrust laws’ as used herein include
24 those acts referred to in the Act of October 15, 1914, as
25 amended (38 Stat. 730; 15 U.S.C. 12), and also include

1 the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13,
 2 13a, and 13b) and the Act of September 26, 1914, as added
 3 March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but
 4 shall not include section 4A of the Act of October 15, 1914,
 5 as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).”;
 6 and

7 (2) by inserting in the table of chapters of such
 8 part VI after—

“159. Interpleader ----- 2361”

9 the following new items:

“160. Necessary parties dispersed in different jurisdictions..... 2371

“160A. Multi-district litigation..... 2381”.

10 (k) Chapter 171 of such title is amended—

11 (1) by inserting after section 2672 the following
 12 new section:

13 **“§ 2673. Actions in district courts**

14 “Subject to the provisions of this chapter, the district
 15 courts, together with the United States District Court for
 16 the District of the Canal Zone and the District Court of
 17 the Virgin Islands, shall have exclusive jurisdiction of civil
 18 actions on claims against the United States, for money
 19 damages, accruing on and after January 1, 1945, for injury
 20 or loss of property, or personal injury or death caused by
 21 the negligent or wrongful act or omission of any employee
 22 of the Government while acting within the scope of his
 23 office or employment, under circumstances where the United

1 States, if a private person, would be liable to the claimant
 2 in accordance with the law of the place where the act or
 3 omission occurred.”; and

4 (2) by inserting in the chapter analysis of that
 5 chapter after—

“2672. Administrative adjustment of claims.”

6 the following new item:

“2673. Actions in district courts.”.

7 SEC. 3. Section 5198 of the Revised Statutes, as amended
 8 (12 U.S.C. 94), is repealed.

9 SEC. 4. (a) Section 22 (a) of the Securities Act of
 10 1933 (15 U.S.C. 77v (a)) is amended to read as follows:

11 “(a) The district courts of the United States, and the
 12 United States courts of any Territory, shall have jurisdiction
 13 of offenses and violations under this Act and under the rules
 14 and regulations promulgated by the Commission in respect
 15 thereto, and concurrent with State and Territorial courts, of
 16 all actions brought to enforce any liability or duty created by
 17 this subchapter. Any such action may be brought in the dis-
 18 trict wherein the defendant is found or is an inhabitant or
 19 transacts business, or in the district where the offer or sale
 20 took place, if the defendant participated therein, and process
 21 in such cases may be served in any other district of which the
 22 defendant is an inhabitant or wherever the defendant may be
 23 found. Judgments and decrees so rendered shall be subject

1 to review as provided in title 28, United States Code. No
2 costs shall be assessed for or against the Commission in any
3 proceeding under this Act brought by or against it in the
4 Supreme Court or such other courts.”

5 (b) Section 27 of the Securities Exchange Act of 1934
6 (15 U.S.C. 78aa) is amended to read as follows:

7 “JURISDICTION OF OFFENSES AND SUITS

8 “SEC. 27. The district courts of the United States, and
9 the United States courts of any Territory or other place
10 subject to the jurisdiction of the United States shall have
11 jurisdiction, concurrent with State and Territorial courts, of
12 violations of this Act or the rules and regulations thereunder,
13 and of all suits in equity and actions at law brought to en-
14 force any liability or duty created by this Act or the rules
15 and regulations thereunder. Any criminal proceeding may be
16 brought in the district wherein any act or transaction consti-
17 tuting the violation occurred. Any suit or action to enforce
18 any liability or duty created by this Act or rules and regu-
19 lations thereunder, or to enjoin any violation of such Act or
20 rules and regulations, may be brought in any such district or
21 in the district wherein the defendant is found or is an in-
22 habitant or transacts business, and process in such cases may
23 be served in any other district of which the defendant is an
24 inhabitant or wherever the defendant may be found. Judg-
25 ments and decrees so rendered shall be subject to review as

1 provided in title 28, United States Code. No costs shall be
 2 assessed for or against the Commission in any proceeding
 3 under this Act brought by or against it in the Supreme Court
 4 or other such courts.”

5 SEC. 5. (a) Each of the States listed in the following
 6 table shall have jurisdiction over civil causes of action be-
 7 tween Indians or to which Indians are parties which arise
 8 in the areas of Indian country listed opposite the name of
 9 the State to the same extent that such State has jurisdiction
 10 over other civil causes of action, and those civil laws of such
 11 State that are of general application to private persons or
 12 private property shall have the same force and effect within
 13 such Indian country as they have elsewhere within the
 14 State:

<i>State of</i>	<i>Indian country affected</i>
Alaska -----	All Indian country within the State
California -----	All Indian country within the State
Minnesota -----	All Indian country within the State, except the Red Lake Reservation
Nebraska -----	All Indian country within the State
Oregon -----	All Indian country within the State, except the Warm Springs Reservation
Wisconsin -----	All Indian country within the State.

15 (b) Nothing in this section shall authorize the aliena-
 16 tion, encumbrance, or taxation of any real or personal prop-
 17 erty, including water rights, belonging to any Indian or any
 18 Indian tribe, band, or community that is held in trust by the
 19 United States or is subject to a restriction against alienation
 20 imposed by the United States; or shall authorize regulation
 21 of the use of such property in a manner inconsistent with any

1 Federal treaty, agreement, or statute or with any regulation
2 made pursuant thereto; or shall confer jurisdiction upon the
3 State to adjudicate, in probate proceedings or otherwise, the
4 ownership or right to possession of such property or any
5 interest therein.

6 (c) Any tribal ordinance or custom heretofore or here-
7 after adopted by an Indian tribe, band or community in the
8 exercise of any authority which it may possess shall, if not
9 inconsistent with any applicable civil law of the State, be
10 given full force and effect in the determination of civil causes
11 of action pursuant to this section.

12 SEC. 6. In any action involving the right of any person,
13 in whole or in part of Indian blood or descent, to any allot-
14 ment of land under any Act of Congress or treaty, a judg-
15 ment in favor of any claimant to an allotment of land shall
16 have the same effect, when properly certified to the Secre-
17 tary of the Interior, as if such allotment had been allowed
18 and approved by him; but this provision shall not apply to
19 any lands held on or before December 21, 1911, by either of
20 the Five Civilized Tribes, the Osage Nation of Indians, nor
21 to any of the lands within the Quapaw Indian Agency.

22 SEC. 7. (a) Section 2 of the Act of March 9, 1920,
23 as amended (46 U.S.C. 742), is further amended to read
24 as follows:

25 "SEC. 2. In cases where if such vessel were privately

1 owned or operated, or if such cargo were privately owned
2 or possessed, or if a private person or property were in-
3 volved, a proceeding in admiralty could be maintained,
4 any appropriate nonjury proceeding in personam may be
5 brought against the United States or against any corpora-
6 tion mentioned in the first section of this Act. Such suits
7 shall be brought in the United States district court for the
8 district where the vessel, cargo, or other property charged
9 with liability, or any substantial part thereof, may be found,
10 or where any substantial part of the events or omissions
11 giving rise to the claim occurred, or where any plaintiff,
12 whether an individual, partnership, association, or corpora-
13 tion, resides or has a principal place of business."

14 (b) Section 2 of the Act of March 3, 1925 (46 U.S.C.
15 782), is amended by striking out the first sentence thereof.

[From the Congressional Record, May 14, 1971]

EXHIBIT 1

ANALYSIS OF THE FEDERAL COURT JURISDICTION ACT OF 1971—S. 1876

(Unless otherwise noted the section numbers refer to the proposed sections of title 28, United States Code.)

Section 132. This amendment would add to sec. 132 of the Judicial Code, which is the section dealing with "creation and composition of district courts," a provision now appearing in the venue chapter as section 1405. References in the present statute to divisions are stricken as obsolete.

Section 451. Sections 1404(d) and 1406(d) of the Judicial Code make the other provisions of those sections applicable to the Canal Zone. The amendment here proposed to sec. 451, which is the general definition section of the code, would bring all of the territorial courts within the provisions dealing with transfer of venue in diversity, federal question, admiralty, and United States as a party cases.

Section 1253. (Present Code) Repealed. This section deals with Indian allotments. The first paragraph gives jurisdiction to the district courts of such allotments when created by Act of Congress or Treaty. These cases are fully comprehended within the federal question jurisdiction, proposed section 1311(a). The second paragraph deals with the effect of judgment. It is proposed to transfer the second paragraph to title 25, which deals with Indians.

Section 1292:

Subsection (a)5: This subdivision adds to the section setting forth the jurisdiction of the courts of appeals reference to appeal as of right, as provided in sec. 1384(c), from remand orders in civil rights cases removed under sec. 1312(c). It also adds reference to appeal, as provided in sec. 1376(a), from orders denying requests for three-judge courts or dissolving such courts. In both cases the time for appeal is limited to ten days.

Subsection (c). This subsection creates a procedure, similar to the procedure for interlocutory appeals under sec. 1292(b), for the review of remand orders raising substantial questions of the right to a federal forum; and also for the review of orders staying a federal court action under secs. 1305(b) or 2373(e) to permit the prosecution of proceedings in a state court, or refusing to dissolve such a stay. Permission of both the district and appellate court is required, in order to ensure that proceedings in state courts will not be held up pending the resolution of frivolous appeals.

Subsection (d). This subsection gives the court of appeals power to entertain appeals from orders remanding removed cases to the state court after disposition of the federal element on which jurisdiction depends, as provided in sec. 1313(d). That section prescribes the procedure for leave to appeal and the effect of the decision in further proceedings in the state court. This subsection differs from sec. 1292(c) in that the permission of both the district and appellate court is required in that subsection, whereas here the district judge does not participate.

CHAPTER 84—DISTRICT COURTS: GENERAL DIVERSITY OF CITIZENSHIP JURISDICTION

Section 1301:

Subsection (a) does not change the basic provisions for diversity for citizenship jurisdiction in the present law.

Subsection (b) changes the present law in subdivision (1) only to provide that for diversity purposes an alien corporation that has its principal place of business in a state is a citizen of that state and to make it clear that a corporation is a citizen of every state and foreign state by which it has been incorporated. Subdivision (2) provides that for diversity purposes a partnership or other unincorporated association capable of suing or being sued in its common name in the state in which the action is brought shall be deemed a citizen of the state of its principal place of business. Subdivision (3) carries into the proposed diversity provisions the amendment to 28 U.S.C. § 1332(c) enacted by Congress in 1964, 78 Stat. 445, preventing reliance on state "direct action" statutes as a basis for diversity jurisdiction. Subdivision (4) provides that for diversity purposes an executor, administrator, or any person representing the estate of a decedent or appointed pursuant to statute with authority to bring an action for wrongful death shall be deemed to be a citizen only of the same state as the decedent. The representative of an infant or incompetent is given similar treat-

ment. The purpose is to prevent either the creation or destruction of diversity jurisdiction by the appointment of a representative of different citizenship from that of the person represented.

Subsection (c) changes the present law only in including "Possession of the United States" in the definition of "State".

Subsection (d) restates the present law with a minor verbal change.

Subsection (e) provides, *inter alia*, that when a person brings an action within the diversity jurisdiction, jurisdiction in that action shall extend to any claim arising out of the same transaction or occurrence brought by any member of his family living in the same household.

Subsection (f) is taken unchanged from 28 U.S.C. § 1351.

Section 1302:

Subsection (a) prohibits invocation of federal jurisdiction on the basis of diversity of citizenship, either originally or on removal, by a citizen of the state in which the district court is held. This reflects existing law as to removal jurisdiction, but is new in depriving a plaintiff of the right to institute an action in a federal court in the state of which he is a citizen because the defendant is a citizen of a different state.

This and the following subsections put denial of access to a federal court in terms of jurisdiction rather than of venue so that the defect will not be waivable.

Subsection (b) prohibits a corporation incorporated or having its principal place of business in the United States, and a partnership, unincorporated association, or sole proprietorship having its principal place of business in the United States, from invoking diversity jurisdiction, either originally or on removal, in a district court held in a state where it has maintained a local establishment for more than two years, but this prohibition applies only to claims arising out of the activities of that establishment. A "local establishment" is a fixed place of business where or in connection with which as a regular part of such business activities of any of the types enumerated in the definition are carried on. The application of the subsection is limited to entities organized or operated primarily for the purpose of conducting a trade, investment, or other business enterprise.

Subsection (c) prohibits a natural person from invoking federal jurisdiction on the basis of diversity of citizenship, either originally or on removal, in any action in a district court held in a state where he has had his principal place of business or employment for more than two years. The purpose is to prevent the commuter who crosses a state line in order to get to his regular place of work from invoking diversity jurisdiction in the state to which he commutes.

Subsection (d) complements the two previous subsections, which measure the two-year period backward from the time of invocation of the jurisdiction. If a corporation, unincorporated association, or individual would have been denied access to a federal court at the time the claim arose, this subsection continues the bar despite the abandonment of the local establishment or place of business or employment thereafter. The subsection also provides that when an individual would have barred at the time of the events, a representative of the individual or his estate is similarly barred.

Subsection (e) excludes from diversity jurisdiction any civil action arising under the workmen's compensation laws of any state.

Section 1303:

Subsection (a) contains the basic venue provisions for diversity of citizenship cases. Venue may be laid either in (1) a district where a substantial part of the events or omissions giving rise to the claim occurred or where a substantial part of property which is the subject of the action is situated, (2) a district where any defendant resides, if all defendants reside in the same state, or (3) a district where any defendant resides if the claim arose abroad. The subsection further provides that a defendant not resident in the United States may be sued in any district.

Subsection (b) provides that the residence of a corporation for venue purposes shall be the district where it has its principal place of business and also each district in any state where it has been incorporated if its principal place of business is not in that state. This restricts venue in actions against corporations, which can under the present § 1391(c) be sued in any district where they are doing or are licensed to do business. In view of the adoption of the place of the events as a proper venue, this residence limitation does not protect a corporation against suit in an appropriate district. A corporation now suable in any district where it does business will be amenable to process in any such district and the venue will be proper if the events occurred there.

The subsection further provides that the residence for venue purposes of any partnership or other unincorporated association is the district where it has its principal place of business.

Subsection (c) makes actions for trespass upon or harm done to land transitory, thus changing the prevailing case law that such actions can be brought only where the land lies.

Section 1304:

Subsection (a) is the basic provision for removal in diversity cases against a single defendant. The only departure from existing law is the prohibition against removal by those persons who are not, by reason of § 1302, permitted to invoke federal jurisdiction in the state where the action is brought. Removal by a citizen of the state is not permitted under present law. A person whose principal place of business or employment is in a state is treated like an in-state citizen and denied removal jurisdiction. Enterprises with local establishments are similarly denied removal jurisdiction in actions arising out of the activities of such establishments.

Subsection (b) gives a defendant in a multi-party action the same right to remove that he would have if sued alone by any party making claim against him; he may remove the entire action and not merely the claim against himself. Third-party defendants are in general accorded the same right, but not in specified categories of cases where the third-party defendant would be likely to be subject to the control of the original defendant.

Subsection (c) changes existing law by treating a plaintiff defending a counterclaim in a state court or a third party impleaded on such a counterclaim as a defendant for purposes of removal. When the counterclaim arises out of the same transaction or occurrence as the plaintiff's claim in the state court, the entire action is removed; otherwise the counterclaim is severed and separately removed.

Subsection (d) permits removal of an action by a defendant with a claim against the plaintiff in excess of the jurisdictional amount if it arises out of the same transaction or occurrence as the plaintiff's claim and if the sole reason why the action would not be removable is that the amount claimed by the plaintiff fails to satisfy the jurisdictional requirements. Under existing law the cases are in conflict on the right of a defendant to remove in these circumstances, with the majority holding that removal is not permitted. The right to remove under this subsection does not turn upon whether or not the counterclaim is compulsory under state law.

Section 1305:

Subsection (a) makes the transfer of a diversity action from one district to another on motion of the defendant depend solely upon whether it is for the convenience of parties and witnesses or otherwise in the interest of justice. The limitation of transfer under present law to a district where the action "might have been brought", together with the restrictive interpretation of these words by the Supreme Court, is removed in order to further the objective of enabling lawsuits to be tried at the place called for by considerations of convenience and justice. Appellate review of the trial court's exercise of discretion on such a motion is barred.

Subsection (b) limits the freedom of transfer provided in subsection (a) by prohibiting transfer to a district where both sides would be barred from invoking federal jurisdiction by reason of § 1302. In many cases all or a substantial part of the events in suit will have occurred in the state where such a district is located, and hence it is likely to be the suitable place for trial. To allow transfer to that district would, however, frustrate the policy of preventing federal litigation in a forum that neither sides deserves. In this situation the court, upon a finding that there is no other place in which trial would be appropriate, shall stay the proceedings if it can do so on such terms as will assure the plaintiffs an opportunity to maintain suit upon the claim in an appropriate state court. To this end the court may condition a stay upon amenability of all defendants, by consent or otherwise, to jurisdiction over the person in the designated state, upon waiver of any applicable statute of limitations in that state, or upon such other terms as may be deemed proper. The subsection further gives the plaintiff the benefit of any attachment obtained in the stayed action.

To prevent delays, decisions staying proceedings under this section are made reviewable only under the special interlocutory appeal provisions of § 1292(c) *infra*.

Subsection (c) deals with the question of the choice-of-law rules applicable in a transferred action. It provides that the transferee court shall apply the rules which the transferor court would have been obliged to apply. The provision codifies the result reached in *Van Dusen v. Barrach*, 376 U.S. 612 (1964).

Section 1306:

Subsection (a) gives the plaintiff in a diversity action a second chance to choose a forum if he can show that a transfer is for the convenience of parties and witnesses or otherwise in the interest of justice. Transfer is limited to a district where venue would be proper and the defendant amenable to process, other than one in which the plaintiff would have been barred by reason of § 1302. Appellate review of the trial court's exercise of discretion on a motion under this or the following subsection is barred.

Subsection (b) provides for a transfer as an alternative to dismissal when venue is laid in the wrong district. This is apparently declaratory of existing law, although the phrase "where it could have been brought" is changed to spell out the requirements that the transferee district be a proper venue and the defendant be amenable to process there.

Subsection (c) resolves the choice-of-law problems by providing that the state law which the transferee court is obliged to apply shall be that of the state in which it sits. This treatment of the problem is different from that provided in the preceding section when the defendant is the moving party. There the plaintiff was allowed to preserve any choice-of-law advantage obtained by his choice of forum. Here he is not allowed to carry this advantage with him when he is seeking a more convenient forum than the initial proper venue, nor when he is seeking transfer from an improper venue to a proper one in lieu of dismissal.

Subsection (d) is designed to permit the court in an appropriate case to award to the defendant costs, including counsel fees, attributable to the plaintiff's failure to bring the action in an appropriate court in the first instance.

Section 1307:

Subsection (a) is designed to replace the present § 1359. It preserves and strengthens the basic prohibition of that section against "improper" or "collusive" making or joining of parties. The new language "pursuant to agreement or understanding between opposing parties" is included especially to deal with the possibility of collusive creation of federal jurisdiction via removal under the provisions of § 1304.

Subsection (b) has no counterpart in the provisions of existing law and is intended to foreclose the use of various devices to create or defeat federal jurisdiction. In particular, this subsection requires that in determining its jurisdiction, the district court shall disregard any sale, assignment, or other transfer of property if an object of the transfer was to enable or to prevent the invoking of federal diversity jurisdiction.

CHAPTER 85—DISTRICT COURTS: GENERAL FEDERAL QUESTION JURISDICTION

Section 1311:

Subsection (a) is declaratory of existing law, under the construction the courts have developed of 28 U.S.C. § 1331(a), except that no amount in controversy is required, and that jurisdiction is extended in terms to all declaratory judgment actions in which the complaint rests on federal law.

Subsection (b) is based on present law, except that it does not preserve the provision of the Securities Exchange Act of 1934 giving exclusive jurisdiction to the federal courts of suits under that Act, and certain other minor provisions for exclusive jurisdiction are repealed.

Section 1312:

Subsection (a) is a major change in present law. To allow removal on the basis of a federal defense or counterclaim is new.

Subsection (b) is a prohibition against removal in various kinds of cases. The bar against removal of Fair Labor Standards Act cases in (1) resolves a split in the present case law. The subsection follows present law in (2) and (3) in barring removal of cases under the Federal Employers' Liability Act and the Jones Act. The bar against removal of suits against carriers under the Carmack Amendment is made general in (4), rather than applying only to suits for less than a particular amount, as in 28 U.S.C. § 1445(b). The bar to removal of work-

men's compensation cases in (5) is taken from 28 U.S.C. § 1445(c). Actions for the enforcement of state laws or for condemnation under state law are not removable, and (6) and (7) prevent them from being removed on the basis of a federal defense. Subdivision (8) bars removal based solely on the defense that the defendant could not constitutionally be subjected to proceed of the state court. Removal is barred by (9) if the only basis for removal is a contention that federal law requires that a judgment elsewhere be honored or that the law of a particular state be applied.

Subsection (c) is taken virtually verbatim from the present statute for removal of civil rights cases, 28 U.S.C. § 1443, but with a part of clause (2) of that section eliminated since the cases involved are now removable under 28 U.S.C. § 1442(a) (1) and would be removable also under § 1323(c) of these proposals.

Subsection (d) changes the present law requiring dismissal of actions removed to the federal court that were properly in the exclusive jurisdiction of the federal courts. As to venue in such cases, see § 1315(b) below. The subsection also permits retention of jurisdiction of an action mistakenly brought in federal court, though not properly within the original jurisdiction, where defendant asserts a federal defense or counterclaim that would make the action removable if it were dismissed and recommenced in a state court.

Section 1313:

Subsection (a) is similar to present law in permitting "pendent jurisdiction" of closely related state claims. The provision that such jurisdiction exists over the state claims even where extraterritorial service was made as authorized by federal law resolves a question on which the cases are sharply divided.

Subsection (b) requires remand to the state court of claims not sufficiently related to the federal element in the case to be within the scope of federal jurisdiction, as defined by the preceding subsection.

Subsection (c) is in accord with existing case law. It covers cases originally commenced in a federal court and recognizes that the court has discretion to refuse to determine the related state claim if the federal claim has been disposed of and the interest of justice is served thereby. If the federal court chooses in its discretion to dismiss the action, this is appealable as a final judgment.

Subsection (d) covers cases coming to federal court by removal. It recognizes a discretion similar to that provided in subsection (c) and provides for the possibility of appellate review of the disposition by the federal court of the federal element in the case. The court of appeals has discretion whether to hear an appeal. The effect of the disposition of the federal element by the federal court on subsequent proceedings in a state court is also stated.

Section 1314:

Subsection (a) contains the basic venue provisions for federal question cases. These are similar to the provisions proposed for diversity of citizenship cases in § 1303(a). Venue may be laid either where any defendant resides, if they all reside within the same state, or where the events giving rise to the claim occurred. If all defendants reside in the same state, and the events occurred elsewhere, plaintiff has a choice of venue. If defendants reside in different states, venue can be laid only in the district where the events occurred. In the rare case where the events occurred outside the United States, and there is a defendant not resident within the United States, or multiple defendants not resident in a single state, venue may be laid where any defendant may be found, under (a) (3).

Subsection (b) is similar to the provision proposed for diversity of citizenship cases in § 1303(b). It provides that the residence of a corporation for venue purposes shall be the district where it has the principal place of business. If it is incorporated in a state or states other than that where it has its principal place of business, it is also considered to reside in each district of the state of incorporation. This restricts venue in actions against corporations, which under the present § 1391(c) can be sued in any district where they are doing or are licensed to do business. In view of the adoption of the place of the events as a proper venue, under subsection (a) (1), this residence limitation does not protect a corporation against suit in an appropriate district. The subsection further provides that the residence for venue purposes of any partnership or other unincorporated association is the district where it has its principal place of business.

Subsection (c) makes actions for trespass upon or harm done to land transitory, thus changing the prevailing case law that such actions can be brought only where the land lies.

Subsection (d) permits service on a defendant in any district. This provision is essential if venue is laid at the place where the events occurred and some defendants are not amendable to process in that state.

Section 1315:

Subsection (a) permits transfer of an action, on motion of any party, to a more convenient forum, without regard to whether the action might have been brought there. Compare the provisions for transfer of diversity action in §§ 1305 and 1306. Appellate review of the trial court's exercise of its discretion on such a motion is barred.

Subsection (b) provides for transfer or dismissal if venue is laid in the wrong district. It is similar to existing § 1406(a), and see proposed § 1306(b). The subsection also applies to actions removed from state court that were in the exclusive jurisdiction of the federal court, so that the party who brings in the state court an action that should have been brought only in federal court does not get the benefit of a venue that would not have been proper had he commenced his action in federal court.

Subsection (c) gives the court power to assess costs, including a reasonable attorney's fee, if transfer under (a) is made on motion of plaintiff, or if an action brought in the wrong forum is transferred under (b). See the similar proposal in § 1306(d).

CHAPTER 86—DISTRICT COURTS; ADMIRALTY AND MARITIME JURISDICTION

Section 1316:

Subsection (a) is declaratory of existing law. The first sentence is taken without substantial change from 28 U.S.C. § 1333. The second sentence resolves a conflict in the cases in the direction of limiting federal jurisdiction.

Subsection (b) replaces the famous "saving to suitors" clause § 9 of the Judiciary Act of 1789—now 28 U.S.C. § 1333—by declaring in terms when jurisdiction is exclusive and when it is concurrent. The line drawn is consistent with that developed by the courts in construing the saving clause.

Section 1317:

Subsection (a) is consistent with existing law in permitting removal if there is some other basis for federal jurisdiction but not allowing removal merely because the action is one of admiralty and maritime jurisdiction.

Subsection (b) changes the present law by permitting removal of an action within the exclusive jurisdiction of the federal courts if the action is mistakenly brought in a state court. See the similar provision in § 1312(d).

Section 1318:

Subsection (a) puts into statutory form the liberal choice of venue that has been traditional in admiralty.

Subsection (b) authorizing service of process in personam in any district is consistent with the admiralty tradition that defendant may be sued wherever he can be found, and with the provisions of §§ 1314(c) and 1326(h). The limitation on process in actions in rem or quasi in rem, stated in clause (2), is in accord with present law.

Subsection (c) incorporates by reference the flexible change of venue provisions of § 1315.

Section 1319:

This section substitutes for the fortuitous and irrational pattern that presently exists a straightforward declaration of when jury trial may be had in an action within the admiralty and maritime jurisdiction. The section: (1) provides for jury trial if diversity or a federal question provide an independent basis of federal jurisdiction and a right to jury trial would otherwise exist; (2) provides for jury trial on demand on all claims within the admiralty and maritime jurisdiction in a federal court—other than those heard in a limitation of liability proceeding and those against the United States—if the relief sought is in personam and is limited to money damages for personal injuries or death; and (3) provides that in all other actions within the jurisdiction no right to jury trial exists. The section simplifies and clarifies the law, without making any substantial change in the number of claims triable to a jury.

CHAPTER 87—DISTRICT COURTS: UNITED STATES AS A PARTY

Section 1321:

This section, and the six other sections in this chapter, are an attempt to restate and to clarify what is already the law. It was considered beyond the purposes of this Study to attempt an evaluation of the proper limits of sovereign immunity. By approving this chapter the Institute takes no position on whether changes should be made in the immunity still retained by the United States.

Subsection (a), making a general grant of jurisdiction over actions in which the United States is plaintiff, is derived from 28 U.S.C. § 1345.

Subsection (b) resolves conflicts in the cases on the extent to which counterclaims and recoupment may be asserted against the United States.

Section 1322:

Subsection (a) is based generally on 28 U.S.C. § 1346. Subdivisions (1) and (2) are taken without substantial change from § 1346(a), except that the jurisdictional limit on Tucker Act cases in the district courts is raised to \$50,000. Jurisdiction is made concurrent with the Court of Claims to preserve the existing construction that the district courts may not hear cases, though within the language of § 1346(a), that are not within the jurisdiction of the Court of Claims. Subdivision (3) is based on § 1346(b), but a new § 2673 is recommended below to put into the Tort Claims chapter of the Judicial Code the substantive provisions now in § 1346(b). Subdivision (4) is new. It grants jurisdiction to the district courts of all cases in which the United States has consented to be sued in a district court.

Subsection (b) authorizes removal of any case in a State court in which the United States is named as a defendant. Compare 28 U.S.C. § 1441(a).

Section 1323:

Subsection (a) is generalized from the more limited provision of 28 U.S.C. § 1357.

Subsection (b) is taken unchanged from 28 U.S.C. § 1361.

Subsection (c) is similar to the statutes that presently permit removal of actions against federal officers, 28 U.S.C. § 1442, 1442a, though somewhat generalized in form.

Section 1324:

Subsection (a) is taken without change of substance from 28 U.S.C. § 1349.

Subsection (b) is based generally on 28 U.S.C. § 1348, but the provision about actions commenced by the United States is omitted as covered by § 1321, and the provision defining the citizenship of national banking associations is omitted as covered by § 1301(b) (1) in the diversity chapter.

Section 1325:

Subsection (a) is taken from 28 U.S.C. § 1336(a).

Subsection (b) combines subsections (b) and (c) of 28 U.S.C. § 1336.

Section 1326:

Subsection (a) is the basic provision for cases to which the United States is a party. It is generally similar to the provisions proposed for diversity cases, § 1303(a), and for federal question cases, § 1314(a), with such modification as the different nature of the cases requires. It permits suit to be brought either where the events giving rise to the claim occurred or where any defendant other than the United States resides. In addition, in cases brought by private parties, if all plaintiffs reside in the same state the district in which any plaintiff resides is a proper venue. Subdivision (a) (4) makes provision for the rare cases in which the claim arose outside of the United States, there is no defendant resident in the United States, and either there is no state in which all plaintiffs reside or the plaintiff is the United States.

Subsection (b) is similar to the provisions proposed for diversity cases, § 1303(b), and federal question cases, § 1314(b). It provides that the residence of a corporation for venue purposes shall be the district where it has its principal place of business. If it is incorporated in a state or states other than that where it has its principal place of business, it is also considered to reside in each district of the state of incorporation. This restricts venue in actions against corporations, which under the present § 1391(c) can be sued in any district where they are doing business or are licensed to do business. In view of the adoption of the place of the events as a proper venue under (a) (1), this residence limitation does not protect a corporation against suit in an appropriate district. The subsection further provides that the residence for venue purposes of any partnership or other unincorporated association is the district where it has its principal place of business, and defines the residence of officers of the United States.

Subsection (c) makes actions for trespass upon or harm done to land transitory, thus changing the prevailing case law that such actions can be brought only where the land lies.

Subsection (d) requires actions in rem to be brought in a district in which all or part of the property involved is located. *Cf.* 28 U.S.C. § 1392(b). It generalizes a policy already reflected in 28 U.S.C. §§ 1395(b), 1399, 1402(c), and 1403.

Subsection (e) states a special rule of venue for tax refund cases, and such cases must be brought as here provided rather than under subsection (a). The subsection is based on 28 U.S.C. § 1402(a).

Subsection (f) states a special rule of venue for those actions involving national banking associations of which jurisdiction is given by § 1324(b). It is based on 28 U.S.C. § 1394. Since this subsection speaks in terms of where the association is located, rather than where it resides, the definition of residence in subsection (b) has no application here.

Subsection (g) states a special rule of venue for those actions involving orders of the Interstate Commerce Commission of which jurisdiction is given by § 1325(a). It is taken unchanged from 28 U.S.C. § 1398.

Subsection (h) is similar to the provision for process in federal question cases, § 1314(d). It permits service upon any defendant in any district.

Section 1327:

Subsection (a) is similar to the provision for federal question actions, § 1315(a). It permits transfer of an action, on motion of any party, to a more convenient forum, without regard to whether the action might have been brought there. Appellate review of the trial court's exercise of discretion on such a motion is barred.

Subsection (b) provides for transfer or dismissal if venue is laid in the wrong district or if a suit within the exclusive jurisdiction of the federal courts is removed to a district in which it could not have been properly commenced. It is similar to the provision for federal question cases, § 1315(b). No provision similar to § 1315(c) is here recommended, because of the differences between private litigation and cases to which the United States is a party.

Subsection (c) generalizes the principle of 28 U.S.C. § 1406(c) which permits transfer to the Court of Claims of cases erroneously brought in a district court, and makes it applicable to cases within the exclusive jurisdiction of any court of the United States.

CHAPTER 88—STAYS IN CERTAIN CASES: THREE JUDGE COURTS

Section 1371:

Subsection (a) is based on the Tax Injunction Act, 28 U.S.C. § 1341, with provision for declaratory judgment actions is required by case law.

Subsection (b) is based on the Johnson Act of 1934, 28 U.S.C. § 1342. That statute, however, is limited to rate orders, while this subsection also bars injunctions against orders of state administrative agencies involving natural resources, in which there is a particularly strong local interest, provided that the conditions of the subsection are met.

Subsection (c) puts in statutory form so much of the "abstention doctrines" as seems justifiable. Its purpose is to define the conditions under which abstention should ordinarily be ordered, so that a state court may determine difficult questions of state law.

Subsection (d) is intended to ensure that where a stay is granted in deference to a state, the action will ordinarily proceed to judgment in the state courts, with review, if any, in the Supreme Court of the United States, and that the action will not return to the federal district court. The district court is authorized, however, to give interim relief where such action by it is needed to prevent irreparable harm, and to vacate its stay and proceed to decision if the state remedy proves ineffective.

Subsection (e) allows certification of questions of state law to state courts with an established procedure for answering such questions, and sets forth the conditions under which certification is permissible.

Subsection (f) bars federal courts from abstaining from decision except as provided in this section. It reaches all actions "commenced in or removed to a district court under this title" and precludes absence in diversity or Federal question litigation unless subsections (a), (b), or (c) are applicable. It does not apply to actions in the Supreme Court of the United States on appeal or certiorari from a state court. Existing discretion as to entertaining actions for declaratory judgments and as to declining relief for want of equity is continued.

Subsection (g) excerpts from these stay provisions actions to redress denial of the right to vote, or of equal protection of the laws, on the grounds of race color, creed, or national origin. It also excerpts from the stay provisions actions brought by or on behalf of the United States.

Section 1372:

The bulk of this section relates the existing Anti-Injunction Act, 28 U.S.C. § 2283, as it has been interpreted by the courts. It does not permit a federal injunction against enforcement of an allegedly fraudulent state judgment. Whether such injunctions are permitted under the present statute is unclear. Exception (7) goes beyond present law to permit an injunction in certain civil rights cases where the very existence of a state prosecution may have a chilling effect on others who wish to exercise rights guaranteed by the Constitution of the United States. Even if a case falls within one of the seven stated exceptions an injunction may issue only if "otherwise warranted," and the usual equitable requirements of irreparable harm and no adequate remedy at law are thus made applicable.

Section 1372:

This section puts in statutory for a judge-made limitation on the power of state courts to enjoin federal proceedings. The first exception is presently recognized in the causes. The second exception, more narrowly drawn than the related exception to the bar on federal injunctions against state proceedings, § 1372(5), changes the present case law.

Section 1374:

Other Acts of Congress requiring a three-judge court, usually only where requested by the United States, are: 15 U.S.C. § 28, 47 U.S.C. 44, and 47 U.S.C. § 401(d) (certain antitrust case); 42 U.S.C. § 1917(g) (voting rights); 42 U.S.C. § 2000a-5(b) (public accommodations); 42 U.S.C. § 2000e-6(b) (equal employment); and 42 U.S.C. §§ 1973(a), 1973c, 1973h(c) (Voting Rights Act of 1965). It is proposed to repeal the provisions for a three-judge court in cases challenging the constitutionality of a federal statute, 28 U.S.C. § 2882, and in TVA condemnation cases, 16 U.S.C. § 831x. The requirement of a three-judge court in cases challenging state action is based generally on 28 U.S.C. § 2281, but its extension to declaratory judgment actions is new, as is the requirement that the defendant must request such a court.

Section 1375:

Subsection (a) is similar to the present statute, 28 U.S.C. § 2284(1), but expressly recognizes the power of the single judge to determine that a three-judge court is not required.

Subsection (b) contains so much of subsections (2) and (4) of 28 U.S.C. § 2284 as is appropriate in light of the changes made in § 1374 on when a three-judge court is required.

Subsection (c) combines provisions that now appear as subsections (3) and (5) of 28 U.S.C. § 2284. The single judge may stay an action which falls within the provision corresponding to the Tax Injunction Act and the Johnson Act, § 1371(a)(b), but, in accordance with existing law, he is barred from ordering abstention under § 1371(c). The second paragraph of 28 U.S.C. § 2284(5) is omitted, as adequately covered by § 1371.

Section 1376:

Subsection (a) provides for review in the courts of appeals of denial of a three-judge court. At present mandamus from the Supreme Court is the usual, but not the only, means of review of such a denial. The subsection also makes failure to request a three-judge court, when such a request is required by law, or failure to take a timely appeal from the denial of the request, a waiver of the requirement for such a court.

Subsection (b) permits direct appeal to the Supreme Court from decisions on the merits by three-judge courts, whether or not the convening of such a court was required by law. If the Supreme Court determines that a three-judge court was not required, it may transfer the case to the appropriate court of appeals but has discretion to proceed with decision of the appeal itself. The subsection also makes provision for certification to the Supreme Court of appeals erroneously taken to a court of appeals.

CHAPTER 89—PROCEDURE FOR REMOVAL OF ACTIONS TO DISTRICT COURTS

Section 1381:

Subsection (a) is similar to 28 U.S.C. § 1446(a), with appropriate reference to the additional matters that must be stated in the petition if removal is founded on §§ 1304 or 2373.

Subsection (b) continues the present requirements of notice to the adverse parties and to the state court, 28 U.S.C. § 1446(e). The time within which this must be done, and the effect of these steps on further action in the state court, are set out in §§ 1382(e) and 1383(a).

Subsection (c) conforms to the case law in looking ordinarily to the amount demanded in the pleading to determine the amount in controversy to be set forth in the petition for removal where the relief sought is not limited to a money judgment. Clause (2) speaks to a point on which the law is presently unclear. It permits an allegation of the amount in controversy in the petition for removal where state practice does not require a demand for a specific sum or where state practice permits damages to be obtained in excess of the amount prayed for in the pleading. In the cases covered by clause (2) defendant is permitted to petition for removal at any time he is prepared to allege that the requisite amount is in controversy, but the time provisions of § 1382(d) are such that he is not required to seek removal until it appears in the state court proceeding that plaintiff is seeking more than \$10,000.

Section 1382:

Subsection (a) states the time for removal is based on the complaint or on a third-party complaint. It is drawn generally from 28 U.S.C. § 1446(b), with the time limit extended to thirty days as provided by the 1965 amendment of that section, and with several different points provided from which the time runs, to meet the variety of procedures used in the states for commencement of an action.

Subsection (b) states the time for removal where removal is based on a counterclaim, or on the answer or reply.

Subsection (c) permits removal on the basis of an amended pleading that first makes the case removable. The party serving the amended pleading is permitted to remove only if he petitions within thirty days of his original pleading, but the other parties are given thirty days from amendment of the pleading.

Subsection (d) states the time for removal in cases within § 1381(c)(2), where the state practice does not require demand for a specific sum or permits recovery of damages in excess of those demanded. The party against whom the demand is made may petition for removal whenever he can allege in good faith that more than the requisite amount is in controversy, but he is required to act not later than thirty days after it appears in the state court proceeding that damages may be awarded of more than \$10,000. If this fact first appears during the trial, or within thirty days prior to trial, removal may be had only if plaintiff has deliberately failed to disclose the amount of damages in order to defeat removal.

Subsection (e) is taken without change from the present statute, 28 U.S.C. § 1446(c), with an added provision for the removal of actions within the exclusive jurisdiction of the courts of the United States.

Subsection (f) speaks to two points on which the existing law is unclear. It provides that giving notice to the other parties and filing a copy of the petition with the state court need not be done within the time limits here provided for filing the petition for removal, but that removal is not effective until those steps have been completed.

Subsection (g) permits a party to seek dismissal on the ground of *forum non conveniens* without incurring any risk of losing his right to remove should his motion be denied.

Section 1383:

Subsection (a) continues the existing rule, 28 U.S.C. § 1446(e), that the state court shall not proceed in the matter after it has been removed, but changes the present law by providing for an exception where the trial is in progress in the state court at the time of removal.

Subsection (b) is taken from 28 U.S.C. § 1450.

Subsection (c) is taken from 28 U.S.C. § 1450.

Subsection (d) combines provisions that presently appear as 28 U.S.C. §§ 1447(a) and 1448.

Subsection (e) is based on 28 U.S.C. § 1447(b). The present procedure for cases in which the state court fails to provide the record, 28 U.S.C. § 1449, is omitted as unnecessary in light of this subdivision.

Section 1384:

Subsection (a) is taken from 28 U.S.C. § 1447(c), with appropriate exception for the provisions of § 1386 that deal with foreclosure of jurisdictional issues, and with provision for an attorney's fee added.

Subsection (b) is based on 28 U.S.C. § 1447(c), but with provision for a stay where the removing party plans to appeal the remand order, and such an appeal is permitted by subsection (c).

Subsection (c) is based on 28 U.S.C. § 1447(d). It makes reference to the availability of permissive appeal of remand orders under § 1292(c), and of appeals of orders disposing of the federal element in a removed case, and remanding the remaining state issue to state court, as provided in § 1313(d). The subsection also carries forward with a clarifying change the provision for appeal as of right from remand orders in civil right cases removed under § 1312(c), first provided in the Civil Rights Act of 1964. The time for appeal has been limited to ten days.

CHAPTER 90—RAISING AND FORECLOSURE OF JURISDICTIONAL ISSUES

Section 1386:

Subsection (a), which has no counterpart in existing law, provides that if issues of subject-matter jurisdiction are not properly raised at an early stage in the proceedings, consideration of such issues by a trial or appellate court is foreclosed. The cutoff date that is adopted is the commencement of trial on the merits, or the rendering of any prior decision that is dispositive of the merits (such as dismissed for failure to state a claim). Five limited exceptions are recognized.

Subsection (b) provides that any governing statute of limitations is tolled by the commencement of an action in a federal court, and for at least thirty days following dismissal (if within that period the action is commenced in a proper court) in any case in which the dismissal was for lack of jurisdiction. This provision is designed to deprive defendants of one of the principal reasons for delay in the raising of jurisdictional issues.

Subsection (c) provides that if a party has commenced a timely action in state court, and the action is dismissed because it is within exclusive federal jurisdiction, the statute of limitations will not bar commencement of a new action on the claim in federal court within thirty days after dismissal of the state action.

STOCKHOLDERS DERIVATIVE ACTION

Section 1695:

The present special venue statutes for venue and process in derivative actions, 28 U.S.C. §§ 1401, 1695, permit suit in the district of the individual defendants' residence with extra-territorial service on the corporation. This proposal will allow extra-territorial service if suit is brought in the district in which the corporation resides. It encourages suit in what will usually be the most convenient forum, and assures the plaintiff of at least one forum in which he can always sue.

GREAT LAKES ACT

Section 1873 (Present Code). The Great Lakes Act is repealed. This act provided that, within the act, both cases in contract and tort could be tried to a jury. It is proposed to unify maritime jurisdiction and provide jury trials only in cases of personal injury or death. See the proposed Chapter 86, Sections 1316 through 1319.

CHAPTER 159—INTERPLEADER

Section 2361 is taken from 28 U.S.C. § 1335, with changes to conform the existing provisions as to interpleader actions to those proposed for the new dispersed parties jurisdiction. In addition a clause has been added at the end of § 1335(b) to assure the result, already reached by the more recent decisions, that the "independent liability" restriction on the bringing of interpleader actions no longer exists.

Section 2362 is the venue provision for statutory interpleader, formerly § 3197, now transferred to Chapter 159.

Section 2363 is the present 28 U.S.C. § 2361 with changes of substance to conform to the provisions of § 2374. These include enlargement of the reach of process, authorization of transfer, and statement of the power of the court to make its own determination of choice of law.

CHAPTER 160—NECESSARY PARTIES DISPERSED IN DIFFERENT JURISDICTIONS

Section 2371:

Subsection (a) provides original jurisdiction whenever necessary defendants are so dispersed as to be beyond the reach of any other single judicial forum, and there is some diversity of citizenship among parties.

Subsection (b) defines when defendants are thus necessary to a plaintiff's action, expressly including those without whom he could not maintain the action in another forum (so-called "indispensable" parties) and excluding joint tortfeasors or others against whom joint-and-several or alternative liability is asserted.

Subsection (c), to reduce threshold litigation, provides that the determination of whether necessary defendants are within the reach of process of a jurisdiction shall be made, not by a factual inquiry as to whether each might with diligence have been found there, but solely by reference to state objective factors.

Definitions of particular terms used in this section are provided in § 2375 *infra*.
Section 2372:

Commencement venue of original actions under § 2371 is limited by this section to those Federal Districts having substantial contracts with the subject of the action. Except where there is no such district (because all relevant events and property are outside the United States), venue is not authorized in terms of parties' residence. Since Federal process can summon parties in these actions from wherever they may be (§ 2374 *infra*), general availability of residence venue is not called for. Liberal transfer of venue is authorized by § 2374(b) *infra*.

Section 2373:

Subsection (a) provides jurisdiction on removal whenever a defendant sued in a State court is unable to bring in additional persons whose presence is necessary to assure a just adjudication as to that defendant, provided that there is some diversity of citizenship among parties. Under the circumstances, the criterion on removal (unlike original jurisdiction) is whether those needed persons can be brought into the State court where the original action is pending.

Subsection (b) defines which persons are thus necessary for a just adjudication that term does not include one who is or may be liable to the defendant for all or part of the plaintiff's claim against him.

Subsection (c) authorizes removal when a counterclaim is asserted in a State court and additional persons necessary for a just adjudication thereof cannot be brought into that State court.

Subsection (d), to assure against abuse of the jurisdiction, requires one removing under this section to certify expressly that all reasonable efforts have first been made to bring the additional necessary parties into the state court proceedings.

Subsection (e), for similar reasons, provides that where another state court is available to entertain the full action and is the forum where it ought to be litigated, the district court may stay its proceedings in favor of an action in that state court. Such a stay order would not be reviewable except under the provisions of § 1292(c) *supra*.

Section 2374:

This section outlines the basic mode of proceeding in actions under this chapter.

Subsection (a) provides that in such actions the district court issue its process for all necessary parties wherever they may be, without regard to district or state lines.

Subsection (b) authorizes transfer of these actions to any other district, even allowing such transfer to be made on the court's own motion prior to service of process on any defendant.

Subsection (c) specifically provides that in selecting applicable state law, the district court need not automatically follow the choice-of-law rule of the state in which it happens to be sitting (or of any other particular state). This is necessary since the several parties may be summoned from various states.

Subsection (d) deals with the special circumstance where a necessary party cannot be served with process, providing that the action shall go on without that person unless the district court concludes that such continuation would work greater injustice than total failure of the action.

Subsection (e) provides for the cases where the smallness of the amount in controversy, compared with the distances over which parties may be compelled to respond, may result in injustice being inflicted simply by prosecution of the action; it provides for discretion in the district court to dispense with the presence of individual parties or to discontinue the action entirely on account of such factors.

Subsection (f) provides that such continuation of the action in the absence of parties who would otherwise be considered necessary (as authorized in the foregoing two subsections) may be conditioned upon appropriate measures to protect affected interests, but that it may in any event be maintained even though an absent party be one who would ordinarily be deemed "indispensable" to the action.

Section 2375:

This section provides definitions of certain terms that are used in this chapter and in the section establishing jurisdiction of interpleader actions. These definitions are applicable only in those places.

Section 2376:

This section provides for extending the provisions of this chapter (specifically § 2374) to actions already in federal court under other jurisdictional grants, in which necessary parties are absent beyond the reach of normal process.

Subsection (a) provides for joining such absent parties whose presence is necessary to assure a defendant a just adjudication in actions brought originally under general diversity of citizenship jurisdiction.

Subsection (b) provides for bringing in parties (who cannot otherwise be joined) whose presence is necessary for just adjudication of a counterclaim that has been asserted in an action in federal court under general diversity of citizenship jurisdiction.

CHAPTER 160A—MULTIDISTRICT LITIGATION

Section 2381:

This section is taken without change from 28 U.S.C. § 1407, added by Act of April 29, 1968. Pub. L. No. 90-296, § 1, 82 Stat. 109.

TORT CLAIMS PROCEDURE ACTIONS IN DISTRICT COURTS

Section 2673. This section transfers to Chapter 171 of the Judicial Code, the chapter that deals with tort claims against the United States, the substantive provisions for such claims now contained in 28 U.S.C. § 1346(b). This section is itself a grant of jurisdiction, but reference is made to it in § 1322(a)(3).

MISCELLANEOUS STATUTORY CHANGES

(Section refers to the section numbers of this bill.)

Section 3. The special venue statute for national banks (12 U.S.C. 94) is repealed. They will be treated for the purposes of venue, as any other corporation would be. The special rule of venue for actions to wind up the affairs of a national bank (28 U.S.C., Section 1394) is preserved by the proposed section 1326(e).

Section 4:

(a) The amendment would permit removal of actions under the Securities Act of 1933.

(b) The amendment would make federal and state court jurisdiction concurrent in actions under the Securities Exchange Act of 1934.

Section 5. This section would place in Title 25, the title of the United States Code dealing with Indian affairs, the provisions that now appear as 28 U.S.C., sec. 1360. The only change is the elimination of the reference to territories, a reference that has been obsolete since Alaska became a state.

Section 6. This section would place in Title 25, the title of the United States Code dealing with Indian affairs, the second paragraph of 28 U.S.C., sec. 1353.

Section 7. The amendments of the venue provisions of the Suits in the Admiralty Act and the Public Vessels Act make them conform better to the admiralty venue provisions set forth in proposed sec. 1318. Unlike sec. 1318(a) the former, incorporated by reference in the latter, makes the residence of any plaintiff a permissible venue, as do the present statutes.

Senator HRUSKA. Mr. Chairman, it is with keen interest that I look forward to this set of hearings by the Improvement in Judicial Machinery Subcommittee on the subject of Federal court jurisdiction.

Over this past weekend as I flew back and forth to Nebraska, I had an opportunity to examine S. 1876 and your introductory remarks, as well as some of the scholarly comments which have been made concerning the American Law Institute proposals. I found all the material provocative and challenging and I shall be interested in hearing the witnesses you have scheduled for this week and next. Because other subcommittees have scheduled meetings in conflict with yours, I'll not be able to be here each day but, nonetheless, I shall be following the statements daily.

The proper allocation of litigation between our Federal and State court systems and the effective utilization of our judicial manpower is a most important concern of the Congress and the bar generally. The ALI certainly should be congratulated on the many years of diligent and thoughtful effort which went into this project. I am hopeful that the end product of its work and ours will be constructive legislation which will improve and make more orderly and logical the functioning of the Federal courts and indeed the State courts as well.

This Senator feels that one must begin consideration of this subject with two basic ideas in mind concerning the need for and nature of Federal courts. First, a body of Federal law—enacted by Congress—exists which should be litigated in a Federal forum to insure a uniformity of result nationwide based on the particularized expertise of the Federal bench. Second, in litigation among citizens from different States, the Federal courts exist to insure fairness and impartiality for all our citizens.

Every case that falls within one of these two areas should under an ideal statute and at the option of the parties be adjudicated in our Federal courts; all others should be litigated within our various State court systems. The allocation of cases to various courts should be made in the most logical manner possible with no irrational exceptions. For example, defendants should be treated as are plaintiffs; forum shopping should be curtailed when the choice of court has no important bearing on the nature of the suit; corporations, partnerships, administrators and guardians should not be permitted to hide behind artificial definitions of citizenship in order to obtain an unnecessary hearing in Federal court.

Present statutes in large measure adhere to these principles. But as with any body of law which has evolved and developed at different times from various sources, some inconsistencies and illogical deviations have resulted. The ALI study seems to me to reconcile all considerations into one proposed statute which remains from beginning to end consistent with basic principles of federalism. S. 1876 strikes me as an excellent resolution of the competing claims of State and Federal courts for certain classes of litigation. It is perhaps not perfect, and I am anxious to hear from those who have some criticisms to make, but I believe it to be a significant improvement on existing portions of title 28.

I have touched on just a few issues involved in this complex subject which are of special interest to me. I do not wish to detain the subcommittee or the witnesses longer. But I did want to indicate at the outset my interest in the subject and my feeling that Congress has important work to do if a rational and modern revision of the entire question of federal jurisdiction is to be enacted.

Senator BURDICK. Thank you, Senator Hruska. At this time I am pleased to call upon Professor Wechsler.

**STATEMENT OF HERBERT WECHSLER, COLUMBIA UNIVERSITY
SCHOOL OF LAW, NEW YORK, N.Y., AND DIRECTOR OF AMERICAN
LAW INSTITUTE**

Senator BURDICK. Our first witness is Herbert Wechsler, Harlan Fiske Stone Professor of Constitutional Law at Columbia University Law School and director of the American Law Institute since 1963.

His career includes service as special assistant to U.S. Attorney General (1940-44); assistant attorney general (U.S. (1944-46); member, President's Commission on Law Enforcement and Administration of Justice (1965-67).

He is also the author of *Criminal Law and Its Administration* (1940, with Jerome Michael); and the well-known case book, *The Federal Courts and the Federal System* (1953, with Henry M. Hart, Jr.). He has written many articles in legal periodicals. Professor Wechsler, welcome to the committee.

Mr. WECHSLER. Thank you, Mr. Chairman and Senators Gurney and Hruska. I have in response to the cordial invitation of the Chairman prepared a written statement covering the grounds that he was good enough to suggest I cover.

I don't believe the Chairman would want me to read that statement word by word but I trust you will be willing to incorporate it in the record and let me address myself to the highlights of the document and respond to any questions you may have.

Senator BURDICK. As a matter of fact, that procedure is very much appreciated. Without objection, your full statement will be made a part of the record at this point.

(The statement of Herbert Wechsler follows:)

STATEMENT OF HERBERT WECHSLER

My name is Herbert Wechsler. I have been a member of the New York bar and a professor at Columbia University Law School since 1933 and the Director of the American Law Institute since 1963. Both as a teacher and as a practitioner I have specialized in the jurisprudence of the federal courts, including the jurisdictional problems with which the bill before you (S. 1876) is concerned. I am, therefore, most grateful to the Chairman for his invitation to appear at this first session of your hearing not only to describe the work of the Law Institute from which the bill derives but also as an individual who has been studying these questions for some forty years.

Indeed, when Congress was engaged in 1948 in the recodification of Title 28, I attempted to interest Senator McGrath, who had the bill in charge, to confront the major policy issues presented by the Act's delineation of the jurisdiction of the District Courts. See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 *Law & Contemp. Prob.* 216 (1948). This was regarded, properly no doubt, as inappropriate in a technical recodification bill. You will, however, understand my satisfaction that the issues postponed then are now receiving your attention; and that the Institute has played a part in bringing this to pass.

It may be helpful at the start to have before you a description of the Institute, the origin of its involvement in these problems and the process by which it arrived at the submissions that the bill would translate into law.

I. THE AMERICAN LAW INSTITUTE

The American Law Institute was organized in 1923 by a distinguished group of judges, lawyers and law teachers as a permanent organization "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to carry on scholarly and scientific legal work," to quote the charter of incorporation in the District of Columbia. Among its founders were the then Chief Justice of the United States,

William Howard Taft, Charles Evans Hughes and Harlan Fiske Stone, who were to succeed him as Chief Justice, Elihu Root, then the acknowledged leader of the Bar, James Byrne, Benjamin N. Cardozo, Learned Hand, William Draper Lewis, Roscoe Pound, Joseph H. Beale, Samuel Williston—to cite but few of many well-known names. George W. Wickersham, who had been President Taft's Attorney General, became the first President and Dr. Lewis the first Director. Mr. Wickersham was succeeded as President by Senator George Wharton Pepper, he in turn by Harrison Tweed and he by Norris Darrell. Dr. Lewis was followed as Director by Judge Herbert F. Goodrich, whose place I took after his death in 1962.

The Institute is, as you know, a purely voluntary, private association which chooses its own members from the bench and bar and law schools of the nation as a whole. Its original membership of only 308 has been progressively increased to the present number of 1500, to which are added some 300 members *ex officio* drawn primarily from the Chief Judges of the highest courts, the deans of the law schools and the presidents of the State Bar Associations. Governed by an elected Council of some fifty members, the Institute meets annually in Washington in May to consider and debate drafts submitted to the membership by the Council after previous consideration and approval by that body. No statement about the law or recommendations for its change may be put forth in the name of the Institute unless it has the concurrent approval of the Council and a meeting of the members, meaning, of course, a majority of those considering and voting on the matter. It is, therefore, true in an important sense that the Institute does not merely sponsor work; it does it.

That work has included through the years the various Restatements of the common law, designed primarily to clarify rather than to change. Torts, Contracts, Agency, Judgments, Trusts, Conflict of Laws, Restitution, Security, Property and the Foreign Relations Law of the United States have been restated in this way. The Restatements of Agency, Trusts and Conflicts have been revised in a Restatement Second; and revisions of Torts, Contracts, Property and Judgments are now under way.

Despite absorption in restatement, the Institute has from the start been interested also in assisting the improvement of the law by legislation. In early years the Model Code of Criminal Procedure (1930), the Model Youth Correction Authority Act (1941), Model Youth Court Act (1942) and Model Code of Evidence (1942) were undertaken to this end. More recently this type of project has increased in volume and importance, starting with the drafting, in collaboration with the Commissioners on Uniform State Laws, of the Uniform Commercial Code, enacted now in all of our jurisdictions but Louisiana. The Model Penal Code, completed in 1962, has played a part in stimulating the reexamination, reorganization and revision of our typically chaotic penal statutes in almost three-quarters of the States, the type of enterprise that the Subcommittee on Criminal Laws and Procedures is now undertaking for the federal criminal law. Work on the Penal Code was followed by the Study now before you and a similar study of Federal Estate and Gift Tax problems. Three other legislative projects are now under way: the preparation of (1) a Model Land Development Code, (2) a Model Code of Pre-Arrestment Criminal Procedure and (3) a Federal Securities Code, attempting to unify and harmonize the major federal securities legislation enacted in the course of almost forty years.

The emphasis that our program thus accords to the development of legislative models does not depreciate the value of restatement. It reflects rather the deepening perception that what our law requires most and will increasingly require in the future is that systematic reexamination and rethinking at the legislative level that is not within the competence of courts as such, though its effective consummation calls for all the insight that judicial experience and knowledge may provide. The Institute with its mixed membership of judges, lawyers and academics affords a useful forum for such effort, laying a groundwork of analysis, information and suggested drafting that can be of service in the legislative process. That is, in any case, the object of our program and the hope that keeps us on the job.

II. THE STUDY OF DIVISION OF JURISDICTION

I come now to the work reflected in the bill. Much to our satisfaction, Chief Justice Warren followed the practice of Chief Justice Hughes in delivering the opening address at the Annual Meetings of the Institute. Speaking in May, 1959, he voiced his concern about "the constant upward trend in the total volume" of cases filed in the United States District Courts and noted the pendency in

Congress of bills to abolish or curtail the jurisdiction based upon diversity of citizenship. Observing that it "is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism," he expressed the hope "that the American Law Institute would undertake a special study and publish a report defining, in the light of modern conditions, the appropriate bases for the jurisdiction of federal and state courts."

The Institute responded by commissioning a preliminary study of the feasibility of such a study, conducted by the late Professor Charles Bunn of the University of Virginia School of Law, formerly and for many years a professor at Wisconsin. On the basis of his report, the Council voted to authorize the project and a grant from the Ford Foundation in 1961 made it possible to move ahead.

The Institute proceeds in all its work by the designation of Reporters who are aided by consultants and advisers in preparing drafts. When a draft has been worked out with the advisers it is then closely considered by the Council. If and as approved by the Council, it is then submitted to the Institute for study and debate at an Annual Meeting. This is a slow procedure, to be sure, but it is well designed to yield a product that not only satisfies the experts in a field but also passes muster with two critical, exceedingly eclectic groups drawn from the bench, the bar and schools throughout the country.

In the case of the Study of the Division of Jurisdiction Between State and Federal Courts, as the project was called, Judge Goodrich nominated and the Council designated Professor Richard H. Field of Harvard Law School as the Chief Reporter, a distinguished teacher and former practicing attorney specializing in civil procedure. Professor Paul J. Mishkin of the University of Pennsylvania Law School assisted him in the study and development of the material on general diversity jurisdiction and also served as Reporter for an aspect of this topic, the special treatment of diversity cases involving dispersed necessary parties beyond reach of any single State jurisdiction. Professor David L. Shapiro of Harvard also participated as Assistant Reporter in the work on diversity jurisdiction. In 1963, when the Study undertook to deal with jurisdiction based on federal question, the Council on my nomination designated Professor Charles Alan Wright of the University of Texas Law School as Reporter for that topic. Thereafter, he also collaborated with Professor Field on the entire study.

As originally designated the Advisory Committee was composed of Judge Oscar H. Davis of the United States Court of Claims, Judge Edward Dimock of the United States District Court for southern New York, Judge Henry J. Friendly of the Second Circuit, Warner W. Gardner of Washington, D.C., the late Professor Henry M. Hart, Jr., of Harvard, Charles A. Horsky of Washington, D.C., Judge Joseph S. Lord, III, of the United States District Court for Eastern Pennsylvania, Judge Albert B. Maris of the Third Circuit, Chief Justice Joseph Weintraub of the Supreme Court of New Jersey, the late Justice Arthur E. Whittemore of the Supreme Judicial Court of Massachusetts, Judge John Minor Wisdom of the Fifth Circuit and myself. President Tweed and Judge Goodrich served as well as members *ex officio*, with Mr. Darrell succeeding Mr. Tweed in 1961. Judge Goodrich died, as I have said, in 1962, and the Committee was enlarged in 1965 to include John G. Buchanan of Pittsburgh, Judge Charles M. Merrill of the Ninth Circuit and Robert L. Stern of Chicago. Mr. Horsky participated only in the early stages, being forced by his official duties to withdraw.

The Council that considered the submissions included during all or part of the duration of the project Judges Dimock, Friendly, Merrill and Wisdom, whom I mentioned as Advisers, as well as United States District Judges Gignoux of Maine, Jameson of Montana and Wyzanski of Massachusetts, Circuit Judges Thomas E. Fairchild of the Seventh Circuit and Carl McGowan of the District of Columbia Circuit, Judge Charles D. Breitel of the New York Court of Appeals, Justice R. Ammi Cutter and Chief Justice Raymond S. Wilkins of the Supreme Judicial Court of Massachusetts, Judge Laurance M. Hyde of the Supreme Court of Missouri, Walter V. Schaefer of the Supreme Court of Illinois and Chief Justice Roger J. Traynor of the Supreme Court of California. It included also such distinguished practicing attorneys as Frederick Ballard of Washington, D.C., John Buchanan of Pittsburgh, Homer T. Crotty of Los Angeles, Arthur Dixon of Chicago, Erwin N. Griswold, the present Solicitor General, Joseph F. Johnston of Birmingham, Ross L. Malone of New Mexico and New York, William L. Marbury of Baltimore, Vincent L. McKusick of Maine, the late Timothy N.

Pfeiffer of New York, Bernard G. Segal of Philadelphia, Eugene B. Strassburger of Pittsburgh, Lawrence E. Walsh and Charles H. Willard of New York and Laurens Williams of Washington, D. C.—in addition to Harrison Tweed and Norris Darrell.

I do not mention these distinguished names to draw *ad hominem* support for the conclusions of the Study but only to make clear that here as elsewhere in the program of the Institute the submissions of Reporters run a gauntlet of close critical appraisal by Advisers and by Council long before they reach the stage of Institute consideration. It took, indeed, three years of work by the Reporters and Advisers, with two separate presentations to the Council, before a first Tentative Draft on the diversity provisions reached the floor in 1963. That Draft was again revised in light of Institute discussion and expanded for the 1964 submission, reaching relatively final form only at the Meeting held in 1965. The portion of the Study dealing with federal question cases and the related problem of abstention first reached the floor in Tentative Draft No. 3 of 1965 and was revised and elaborated in Drafts No. 4, 5 and 6 in three succeeding years. Each new Draft was, of course, worked over with the Advisers and the Council in the manner I already have described.

This does not mean, of course, that either the Advisers or the Council or the members of the Institute attending the five meetings that considered the successive drafts unanimously favored all of the conclusions of the Study. In the Institute as at the bar in general there is a school of thought opposed to any diminution of existing federal jurisdiction and a school opposed to all expansion. There are those who more specifically are opposed to the contractions of diversity the Study recommended, as there are those, like Chief Judge Friendly, who regard the Institute proposals as at best a half-way measure and would favor the complete elimination of this head of jurisdiction. The crucial fact, however, is that the submissions of the Study, as embodied in the bill, were supported by a large majority of the Advisers, of the Council and, on full consideration and debate, of the members voting at the meetings. Moreover, where there were substantial differences of view, the nature and the grounds of the opposed positions are fully described in the Reporters' commentary with a careful and a candid statement of the basis for the view that was endorsed. The purpose was to be as helpful as the Institute could be to those responsible for making the legislative judgments to be made.

III. THE MERITS OF THE BILL

If I spoke only as Director of the Institute, I should terminate my statement at this point, since the Institute regards its work as finished when it publishes an Official Draft. But as the Chairman honored me by the suggestion that I give my own appraisal of the draft proposal, I do not hesitate to say that I support both the approach and the substance of the bill.

By the approach, I mean the effort to define the proper jurisdiction of the District Courts and the relation of those courts to the tribunals of the States in terms of what Chief Justice Warren called, in asking for the Study, "the principles of federalism." Those principles involve in my opinion nothing more pretentious than the grounds of policy by which the Congress normally appraises the wisdom of a federal assumption (within Constitutional limits) of responsibilities and functions that would otherwise remain within the province of the States. With respect to the jurisdiction of the courts, such considerations necessarily transcend the interests or desires of one or another class of litigants or even the convenience of their counsel. Their focus is on the structure of the government, the distribution of authority and consequent responsibility between the Nation and the States. No one would now doubt the breadth of the Congressional authority to regulate matters involving or affecting commerce among the States. But whether Congress will resolve to exercise its power with respect to any given matter surely turns on demonstration of the need for intervention by the Nation. The problem is no different in defining jurisdiction, within the limits that the Constitution places on the federal judicial power.

Given this approach, the main changes that the Institute proposed are almost logical derivatives. Since diversity of citizenship cases call by hypothesis for the administration of State law, law that the courts of the State alone can interpret with authority and only the State legislature can modify by statute, must not federal judicial jurisdiction predicated on that ground be measured by a current finding of national interest and the demonstration of a current need?

The bill accepts the early postulate that such interest and need exist to provide the litigant from out of State with a disinterested forum. That was the judgment of the Institute's Reporter and of most of the Advisers, the Council and the members. I defer to their experience and wisdom, though I have had my doubts for many years. But the postulate does not support permitting invocation of the jurisdiction by the in-State plaintiff or the foreign corporation with a local establishment within the State from whose activity the case arose or even by an individual whose business or employment is located in the State. Their access to the jurisdiction should, accordingly, be barred, as § 1302 would provide. On the other hand, there are situations where diversity exists and the dispersal of the necessary parties would preclude a State from entertaining jurisdiction. In such case there is a need for national jurisdiction to prevent failure of justice and Chapter 160 would provide it far more broadly than the present statute. Finally, manipulations to create or to defeat the jurisdiction, now permitted in the case of representatives, associations and joinder of resident defendants, would be barred.

Others will speak to these provisions in detail and I shall not anticipate their statements. I say only that the bill's treatment of diversity is responsive to the norms by which the scope of jurisdiction should be judged.

With respect to jurisdiction founded upon federal question, the bill proceeds upon the basic postulate that the vindication of federal law is uniquely the function of federal courts and that the jurisdiction should be general, at the option of either plaintiff or defendant, subject to exception only when there is a strong State interest in confining the proceeding initially to the State courts. See § 1371. The requirement of jurisdictional amount would therefore be eliminated in original actions and retained only when removal is invoked because of the existence of a dispositive federal defense (§§ 1311, 1312(a)(2)), a case in which removal is precluded under present law but would be permitted, with specified exceptions (§ 1312(b)), by the bill.

Since these proposals will be considered at a later hearing I shall say no more about them now than to defend their basic theory and to note that the acceptance of that theory fortifies the case for the diversity provisions. If the burden on the District Courts in matters that are uniquely federal is to increase substantially, as seems inevitable quite apart from the proposals of this bill, there surely is a vital need for the elimination of those aspects of the burden that serve no valid national purpose in the circumstances of our time.

What I have said speaks only to the highlights of the bill but I would add in closing that the draft contains much else that is of value. It clarifies, without substantial change, the delineation of the jurisdiction in admiralty and in cases where the Government is plaintiff or defendant. It improves the structure of the statute by treating venue, transfer and process separately under each major head of jurisdiction. It diminishes the risk of waste in litigation by providing for foreclosure of jurisdictional issues raised belatedly without appropriate excuse (§ 1386). Its limitations on the use of three-judge courts (§ 1374) effect a salutary saving, if, indeed, such courts will be preserved at all, as has been questioned since the Study was completed. There is a host of technical improvements in detail that I am sure will be explored at later stages of your hearing.

What is important now, and is the point of my submission, is that the jurisdictional proposals of the bill would go far to assure that the sum of federal adjudication represents as prudent use as can be made of the important national resources represented by the federal courts.

Mr. WECHSLER. I should say I have been a member of the New York bar and a professor at Columbia since 1933, and director of the American Law Institute, as you said, since 1963. As an individual, I have been working on these problems and giving thought to the subject with which the bill is concerned for I regret to say some 40 years. Indeed, when Congress was engaged in 1948, in the last revision of title 28 of the code, I tried to interest Senator McGrath of Rhode Island, who was a friend of mine and who had the bill in charge, in confronting these basic issues of policy with respect to the scope of Federal jurisdiction but Senator McGrath wisely thought that a technical recodification bill was not the appropriate occasion for such an enterprise and it was not done.

I take special satisfaction, Mr. Chairman, in the fact that the issues that were postponed then are now, almost a quarter of a century later, receiving attention.

Now, your own introductory statement gave some fine and gratifying remarks about the Institute so I won't go over that ground in detail. I should perhaps say that the organization was founded in 1923, as a permanent organization "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice." The charter of incorporation had as its first three names Chief Justice Taft, Charles Evans Hughes, and Elihu Root.

The roster of the initial members certainly included some great names and I would hope that the larger membership today comes close at least to the standards that were set at the start. We are a purely voluntary organization. We choose our own members and the membership has grown from the original number of 308 to 1,500 elected members at the present time to which are added some 300 members ex officio who are drawn primarily from the chief judges of the highest Federal and State courts and the law school deans.

The organization is governed by an elected council of almost 50 members which meets two or three times a year to consider the drafts submitted to it by reporters and advisers. Only if and as the council approves a draft for submission to the Institute does it go to the membership. It is then printed, distributed by mail to all of the members elected and ex officio, and it is put on sale to the public. And in due course when the Institute convenes in May, the submission is discussed.

This is the procedure that was followed in the production of the restatements in the work on the revision of the restatements, and then the codification work that has been done.

With the passage of time, the code work has become perhaps the major focus of our Institute's activity, including as the Chairman said, the model penal code and the model code of evidence. But I would also call your attention to the uniform commercial code which was drafted by the Institute in collaboration with the Commissioners on Uniform State Laws.

And as the committee knows, it's now the commercial law of the country in every jurisdiction but Louisiana. I have reason to think that even in Louisiana, the Uniform Commercial Code, or a major part of it, will sometime be adopted.

The reason for this emphasis on code work is I think relevant to the bill before you. It reflects the deepening perception of the Institute that what our law requires most and will increasingly require in the future is the kind of systematic reexamination and rethinking that can only take place at the legislative level but that it calls for aiding legislative judgment by all of the insight and knowledge that comes from judicial experience. The Institute has so many judges and so many great judges in its membership that it is not surprising that the work that has been done is of a quality that legislative bodies have found helpful.

We do not attempt to deal with the great, controversial issues of policy in our national life. We make a very careful judgment as to the kind of issue where the careful, scholarly, professional approach of the Institute is relevant and helpful and the kind of issue that calls

for a deeper canvass of political and social attitudes on which our body has no special expertise.

Now, this study reflected in the bill before you is certainly of the order of interest that I have described. It is a bill that deals with lawyers' law and not with basic political or social policy.

I would like to think that the initiative on the study came from us or particularly that it came from me but as the chairman indicated, that was not the case. It came from Chief Justice Warren who followed the practice of Chief Justice Hughes in doing us the honor of making the opening statement at the Institute's meetings in May 1959. At the annual meeting in 1959, he called attention to the increase in the case-loads of the Federal courts, and he invited the Institute, he urged the institute to undertake "a special study and publish a report defining, in the light of modern conditions, the appropriate bases for the jurisdiction of Federal and State courts." He also said in that statement that he thought that it was essential to achieve proper jurisdictional balance between the Federal and State court systems, giving to each system those cases most appropriate in light of the basic principles of federalism.

He obviously thought that there were basic principles of federalism that were relevant to the delineation of the jurisdiction of the Federal courts. And I must say, the Institute agreed with him and this is the crucial point of the present bill.

In any event, it was on the basis of that instigation that the council authorized a study which was financed by the Ford Foundation.

The Institute proceeds in all its work by designating a chief reporter and associate reporters and an advisory committee and this work was undertaken by the people mentioned in the Chairman's statement.

I was originally an adviser before I became director. I stayed with the committee from the start and I must say that I have never worked with a more devoted, more dedicated, harder working group of men than the group that reviewed these reporters' submissions, resulting ultimately in the submissions to the council and the Institute and in the actions of the Institute that are reflected in the bill.

There were many Federal judges and many State judges and practitioners; there were academics. It was not unanimous, but the basic submissions that the Institute approved were approved by a preponderant majority of the advisers and the council and, after much debate on the floor of the Institute, by a substantial majority of the members voting.

And they were approved, moreover, Mr. Chairman, after the very issues that will certainly be put before you in opposition to this bill were put forth by the very people who will put them forth here. They were fully debated and fairly debated and resolved by vote.

The work took 5 years of Institute meetings and some 10 years of total labor because we were 3 years before anything was taken to the floor and some 2 years afterward in putting the draft together and working through the publication. I must say again, Mr. Chairman, as a director I feel obliged to say that none of the bodies involved in this work were unanimously in favor of the ultimate submissions. In the Institute, as in the bar in general, there is a school of thought opposed to any diminution of existing jurisdictions and there is a school of thought opposed to any increase of existing Federal jurisdiction. There are those who more specifically are opposed to this proposed

revision of the jurisdiction, and there are those like Chief Judge Friendly—who is Chief Judge of the United States Court of Appeals for the Second Circuit—who regard the Institute's proposals as at best a halfway measure and would favor the complete elimination of this Federal jurisdiction.

Friendly was an adviser and is a very valued member of the council. He was very active in the debates on the floor. I think it fair to say that while he supported these proposals at the time, in his own mind he was moved under the pressures of mounting caseloads and now that he is chief judge, with an even greater sense of responsibility about those caseloads, his own mind has moved beyond these proposals to the view that the Federal courts should be taken out of State administration, out of the administration of State law entirely.

But I hope as I said, that he will be able to speak to the committee for himself because I think his views are worth hearing from him.

My point now is only that these proposals were worked over and screened and debated and revised in a process that brings to bear about as many minds and as wide a diversity of background and differences in points of view as any disinterested body—at least as any disinterested group concerned with law and its improvement—could possibly have.

Finally, Mr. Chairman, I would like to say a personal word about the proposals in the bill. I do not hesitate to say that I have strongly supported both the approach and the substance of the bill. I really want to emphasize the approach, Mr. Chairman, because by the approach I mean the effort to define the proper scope of the jurisdiction of the district courts in terms of what Chief Justice Warren called “the principles of federalism.” And those principles in my opinion are nothing more pretentious than the grounds of policy by which Congress would normally appraise the wisdom of the Federal assumption, within constitutional limits of course, of responsibilities and functions that would otherwise be within the province of the States.

Those considerations of policy that would be given weight in other areas should be given weight in this. And it is a curious thing to my mind that so many people who are so very State-minded with respect to matters of substantive regulation, when it comes to talking about Federal jurisdiction, forget their natural addiction to the principles of federalism and begin to talk solely about the convenience of litigants or the fairness of having an option on one side that doesn't exist on the other.

The crucial point that I think the Chief Justice meant to emphasize, and that the Institute embraced, is that these considerations of policy have nothing to do with the interest or desires of one or another class of litigant or the convenience of their counsel.

All of us as lawyers understand that if you have an option as to jurisdiction, you'll be reluctant to lose that option and from the point of view of your litigating practice, you'll want to kick in a vulnerable place anyone who proposes that you lose the option. But the Chief Justice was right in his thinking and I think that is the way these problems can be confronted; namely, their focus has to be on the structure of Government, on the delineation of power and responsibility between this great Nation and the actions of Congress and of its Federal organs and those of the constituent States.

Nobody would doubt for example the congressional authority to regulate commerce among the States or matters affecting commerce. But whether Congress will resolve to exercise that authority in any particular area is surely a matter that turns on the demonstration of a need for Federal intervention. If I appeared before a congressional committee concerned with the regulation of commerce and just said: "Well the Constitution says Congress has the power to regulate commerce so please regulate safety in New York harbor." Wouldn't the first question be: "Well what is the matter with New York regulating safety in New York harbor?" Surely I would have to show that there was some reason for Federal intervention before anybody would listen to me seriously.

And really, the basic approach as I call it here is nothing more than the proposition that that view of Federal intervention is just as right with respect to the jurisdiction of courts as it is with respect to any substantive regulatory measure.

Now, given then that approach, it seems to me that the main changes that the bill would make in diversity jurisdiction are almost logical derivatives. If you accept the hypothesis, you might say that there is a need of a Federal forum in diversity cases to protect out of State people against a possibly biased or even an unconsciously biased State tribunal, to at least provide an independent tribunal, one that will be deemed by the litigants to be an independent tribunal (because we have no evidence of bias, because it is just an assumption). But still, granting that postulate, and the Institute did grant it, they granted it fully and I will defer to their experience and wisdom though I myself have had doubts about the postulate for many years, but granting the postulate, as the Chairman said in his opening statement, it simply doesn't support permitting the in-State plaintiff to invoke diversity jurisdiction or I would submit a foreign corporation that has a local establishment to invoke diversity jurisdiction as to a cause of action arising from that local activity, which the bill would preclude.

And I think also the bill is right on so-called commuters. That is, on people with a business domicile in a State other than the one in which they live, though I admit that that perhaps is the most debatable point within the framework of the postulate, that is the most debatable proposition involved in the bill.

I simply can't see how anybody faithful to the principles of federalism can argue that the bill is wrong in its main thrust. I think one could argue it didn't go far enough, but I don't see how one could argue that it goes too far. On the other hand, there are situations where diversity exists but the dispersal of the parties in different jurisdictions would preclude a State, any given State, from entertaining a dispositive lawsuit.

This is a case where there is a need for Federal intervention. There would be a failure of justice in that situation unless the Federal Government, acting within its constitutional power, provides a forum that the States are unable to provide.

A perfect illustration, of thinking about this in terms of the principles of federalism, is the proposition that if the States are simply unable because of the limitations of their boundaries to provide a forum and Congress has the power to do so, there is a valid reason for Federal action.

Actually, of course the present diversity jurisdiction does this to some extent but the bill would extend diversity jurisdiction to do it where the present law does not, as in the case where there is overlapping citizenship, namely, where the old Strawbridge and Curtis Rule would preclude jurisdiction.

Then again take removal by an out-of-State resident and the trick of precluding removal by joining a codefendant who is a resident of the State. The bill would pierce that trick. There is a case for removal by the out-of-State defendant that is not weakened by the fact that he is joined with a resident defendant. A local jurisdiction may simply find for the resident defendant and against the nonresident defendant, on the hypothesis or postulate of lack of impartiality. So, the bill would extend Federal jurisdiction there.

And there are other details of that sort. It is not just a bill to limit. It is a bill to rationalize in terms of the principles of federalism, not novel principles but the principles that are intrinsic to the beliefs and actions of the Congress of the United States.

Now, with respect to the jurisdiction founded on Federal question, there is as you know a completely different view in the bill. Namely, that the administration of Federal law is properly a Federal function except in situations where there is a special State interest in confining initial determinations to the State courts. There are such situations and they are enumerated in the bill in the provisions barring removal and also in the important section 1371 which is called abstention but is really an admonition not to exercise original jurisdiction where it otherwise would obtain. On the other hand, jurisdictional amount has nothing to do with this.

I remember during the second World War when I was the assistant attorney general in charge of the war division and the Japanese were being herded out of California, it fell on my division to defend the litigation that was brought on behalf of the excluded people. Of course, in the end the question was settled in criminal prosecution but there were a lot of injunction suits brought to restrain the commanding general from taking this action on the ground that it was unconstitutional.

I didn't think it was and the Supreme Court held it wasn't but it was so claimed and was a reasonable claim. Well, if you brought a suit on behalf of a lettuce picker in one of the California valleys who may have been earning at that time \$1,000 or \$1,200 a year, could you establish jurisdictional amount?

The statute required that there be a jurisdictional amount even in cases arising under the Constitution of the United States and it now requires it. And it was a very difficult matter for us in the Department of Justice because while we were ready to defend the action of the President and Congress and the military on its merits, we were reluctant to go out there and say sorry, no jurisdiction, no court can hear this claim. That did not seem to us to comport with the basic principles that we were fighting a war to defend. And yet it is the duty of Government counsel to raise a jurisdictional point when it exists. Those people were entitled to a forum, though as I said, I happen to think that it wasn't unconstitutional, a very minority view of the mints these days, when everything is believed to be unconstitutional that involves individual rights.

I put this example out of my own experience, only because it demonstrates to me that the jurisdictional amount limitation in the general Federal question area is unreasonable.

There may, of course, be particular kinds of Federal statutory actions where there ought to be exclusive State jurisdiction. Congress has made that sort of determination in the past and it will undoubtedly make it in the future but that should be a determination based on the nature of the particular claim, in my own view, rather than be predicated on the amount involved that again is the approach of the bill.

Again, the bill would allow removal subject to limitations on the basis of the Federal defense when it is not now permitted by the statute. The original action must arise under Federal law for there to be Federal jurisdiction even by removal of the defendant. It must be under the bill a dispositive defense so that State litigation is not interrupted by removal, but if it is, then it seems to me that there is the same kind of reason for an initial Federal jurisdiction as there normally is when a claim arises under an act of Congress or under the Constitution or treaties of the United States.

There are other provisions in the bill, as the Chairman said, dealing with matters of detail in the administration of the jurisdiction, like three-judge courts and stays which are very important, and the provision on foreclosure of jurisdictional issues. But this isn't the time to talk about them. I fully understand that, Mr. Chairman, and I simply mentioned them as a virtue of the bill. What is important now, I realize, and is the point of my submission, is that the jurisdictional proposals of the bill would go as far as it seems prudent to go to assure an important end, namely, that Federal adjudication represents the proper use of what I am sure you will agree to be one of the greatest of our national resources: namely, the Federal courts of the United States.

We submit that the present delineation of the jurisdiction has elements that are imprudent and that the bill would improve that situation very much indeed.

Senator BURDICK. I have a series of questions to ask you myself, but I am going to defer to my colleagues.

Senator HRUSKA?

Senator HRUSKA. Thank you, Mr. Chairman. I want to express complete concurrence with your references in your opening statement to the work of the American Law Institute. Of course for a number of years now we have come to look upon Professor Wechsler as a person who is an indication of the better education of many of the professional people who do the work of the Institute.

Through the years, ever since this Senator has been a practicing attorney, we have always looked forward to the work of the Institute and its various statements and the leadership it has asserted and the academic law being applied to the work-a-day work in the professional practice of law.

Mr. WECHSLER. Thank you.

Senator HRUSKA. I have no questions at this time. The statement does recall to our minds many of the principles that we will seek to apply and have abided by as we go through the details of this bill.

Thank you very much.

Senator BURDICK. In the commentary on diversity jurisdiction it is pointed out that one of the incidental purposes of such jurisdiction was it was created in 1789 to enhance the awareness of the people of the existence of the new and originally weak central government.

Do you agree that today there is no need to make our people aware of the Federal Government?

Mr. WECHSLER. I can certainly agree with that.

Senator BURDICK. The ALI study recommended that the federally created rights, the so-called Federal question cases, should be a primary responsibility of the Federal courts. I think that is part of the theory you presented this morning.

Mr. WECHSLER. Yes.

Senator BURDICK. And the ALI study recognized that the cases that primarily involve the interpretation of State law should be generally the responsibility of the State courts?

Mr. WECHSLER. Certainly, and the only addition I would make, Mr. Chairman, is to remind the committee that, of course, it is at the option of the litigants, either litigant, that the Federal jurisdiction based on the Federal question would be provided and extended. There is no modification in the bill, as I understand it, of the very limited exclusive jurisdiction of the Federal district courts. It is a matter of concurrent jurisdiction in making a Federal forum for the adjudication of claims of Federal rights available at the option of either party to the lawsuit. That is the situation that exists, because the plaintiff must be relying on Federal law to invoke the original jurisdiction. But even though he is relying on State law, if it is a Federal defense, the defendant would be accorded by 1312(b), I think, a limited right of removal, but a much broader right than now exists.

Senator BURDICK. The statement recommends that Federal courts should be open to State law cases when the person invoking the Federal jurisdiction has a rational basis for saying I am an out-of-Stater and my rights in this case may be affected by local prejudice.

Mr. WECHSLER. That is the whole approach.

Senator BURDICK. And the theory is that the local party cannot be prejudiced because he is within his own State whether defendant or plaintiff?

Mr. WECHSLER. Well, we are all subject to prejudice in the State in which it pleases the Lord to call us if I may invoke that ancient principle. And Congress can't do anything about that unless it undertakes to amend the Constitution to completely federalize the administration of justice.

I don't know of anybody who is advocating that and it is not likely to come to pass. Of course, there are all sorts of prejudices everywhere from which litigants may suffer and in extreme cases the equal protection clause of the 14th amendment may give them some help on direct review by the Supreme Court. But this matter is concerned with only one of the many possibilities of prejudice; namely, the danger of prejudice to out-of-State litigants. And it is reasonable that that should be the case because this is the Congress of the United States which is functioning under federalism and it is the inter-State feature of it that makes it a matter of Federal concern.

Senator BURDICK. I have talked to some active practitioners and they are very frank to say we like the option, we like to shop around a bit.

Mr. WECHSLER. They sure do and as a practitioner, so do I.

Senator BURDICK. One last question—you suggested there is no need for corporations doing business in the State to invoke diversity jurisdiction. Could you give us your views or definition or expand on the provisions of the term "local establishment"?

Mr. WECHSLER. Yes, indeed, though Professor Field is the draftsman. In that conference with the Committee on the Judicial Conference, I remember particularly Judge Orie L. Phillips, who happened to be a friend of mine who is now retired but still happily is with us and even occasionally sitting, was very especially interested in that and I believe contributed very substantially to the definition of the term "local establishment." That term, you remember, appears at the bottom of page 7 of the bill in section 1302(b)(2). And the definition is: "a fixed place of business where or in connection with which, as a regular part of such business," and it continues by saying where: "services are rendered or accommodations furnished to persons within the state, sales, delivery, or distribution of goods are made to persons within the State by one regularly maintaining a stock of goods or a showroom for the display of samples within the State, sales of insurance, securities, or other intangibles, or of real property or interests therein, are made to persons within the State, or production or processing takes place. Dealings carried on through an independent commission agent, broker, or custodian do not give rise to a local establishment."

Now, this is a pretty tight delineation of the kind of out-of-State enterprise that has an exceedingly visible presence within a given State of the Union and when I say out-of-State enterprise, I am referring to the fact that it was incorporated out of State.

I was in a little town during the summer in Massachusetts out in Cape Cod. We go to market in these big stores occasionally, like the First National and Sears & Roebuck. I don't know where those enterprises are incorporated. The local people who run them are popular with other local people and the fact that lawyers might know the enterprise was incorporated in Delaware or Illinois is simply of total irrelevancy.

My submission is that people regard that as a valuable local enterprise and if somebody gets hurt in the store, and there is an action for damages for a broken leg, the notion that that has to go up to Boston to be tried in the U.S. district court rather than to be tried in the county by a local jury just doesn't make any human sense to me. And I am sure it wouldn't make any sense to my neighbors.

Senator BURDICK. Well, using that reference to Sears & Roebuck, suppose that local establishment is a mail-order place where the customers bought their catalog and received the goods in due time and perhaps it had a few samples around of various articles they had to sell.

Mr. WECHSLER. Well, the language of the bill states that it must be one regularly maintaining the stock or goods in a showroom for display of samples within the State. That is, a showroom for the display of samples is very important.

Now, obviously all language calls for interpretation and obviously that is going to be interpreted. What is a showroom for the display of samples? I can readily understand one holding that in relation to the magnitude of an enterprise, a few carpet sweepers stuck in a store

window somewhere do not amount to the display of samples. So indeed, it may be possible to tighten the language up if it is felt that the language is too weak.

But it is the central idea though that if it is a visible presence within the State, it is really localized for all other purposes because it enjoys the advantages of the locality. As a matter of human fact it is not to be differentiated from the situation where State law may require—as some States do—that for foreign corporations reincorporation in the State is necessary in order to do business within the State. When there is such reincorporation, the diversity jurisdiction has no application under existing law. This would face up to the reality without reference to the need for demanding domestic incorporation. As a matter of fact, when I was a law clerk to Justice Stone in 1932, I remember there was a hearing on a bill that was proposed by President Hoover's Attorney General, the great Attorney General Mitchell, which would have had really a more extreme domesticating effect on foreign incorporations for purposes of diversity jurisdiction than this bill would. And so it is a very old idea in relation to dealing with corporate litigation and not a new idea. And it has had the support of some very able and concerned people for a very long time.

Senator BURDICK. Thank you. Senator Gurney?

Senator GURNEY. Thank you, Mr. Chairman. First I want to extend my appreciation to you and add that it is fitting for the committee to welcome you at this point.

Mr. WECHSLER. Thank you sir.

Senator GURNEY. I don't want to go into the background of the bill. Your statement touches on the constitutional makeup of it and a little bit about how the study was made. I would just like to ask one or two questions about that.

Mr. WECHSLER. Yes, sir.

Senator GURNEY. For example, I have right before me the statement about the reporters and the advisory committee. Who advises the reporters? How did you go about putting the staff together to assist these reporters in making this study?

Mr. WECHSLER. Well, first of all let me say that when the project was initiated Judge Herbert F. Goodrich was director of the Institute and the task fell to him to organize the study. And it was on his nomination that the council of the Institute designated Mr. Field, who is here today. That was approved not only because of Professor Field's distinction as a teacher, as a specialist in the procedure and the administration of justice, but also by the fact that he had a very significant background as a practitioner. I know that because Judge Goodrich told me that at the time when he asked me to be an adviser.

Now, so far as the assistance of Professor Mishkin of Pennsylvania and David Shapiro of Harvard are concerned, I rather suspect their names came out of a discussion between Professor Field and Judge Goodrich. That is the way I would normally do it. I would want the reporter to have an assistant whom he had confidence in, subject to consideration of whether anything in the background which would prohibit bringing these people in.

Senator GURNEY. Incidentally, are all reporters that were used mentioned in your statement here?

Mr. WECHSLER. Yes, sir.

Senator GURNEY. Let's take one, for example, Professor Mishkin. Now, who did he have as staff assistants? Who were they?

Mr. WECHSLER. These are typically very understaffed operations, Senator Gurney. These people are picked because they are steeped in this material.

As far as I know Professor Mishkin may have had a law student as a research assistant to go through the advance sheets or the recent digests and make sure there weren't any cases he didn't know. And I don't believe Professor Field had any assistants, apart from those named here, unless he had some student help. This is the kind of assistance that one uses in law school work generally. It is good for the students and they are reliable to do that kind of work, Senator.

Senator GURNEY. In other words, the American Law Institute furnished no staff members for this study?

Mr. WECHSLER. No, the American Law Institute has almost no staff. You are looking at about one-third of it when you look at me. It has no other staff apart from the people engaged in mechanical work: typists, and the people engaged in the printing of these drafts of materials that we put out.

Senator GURNEY. As I understand it, each reporter did the usual thing that a law professor does when he is making a study; that is, to use some of the brighter people in the law school at any particular time. Is that right?

Mr. WECHSLER. That would be I think exactly right though I do not actually know if Mr. Field had any students. I know he is a very jealous fellow about letting anybody cross a "T" or dot an "I".

Senator GURNEY. Next question: When a workpaper was put together, I take it that it went to the advisory council for review; is that correct?

Mr. WECHSLER. We call it the advisory committee, that is the advisers on a particular project.

Senator GURNEY. How many times did that happen, for example, on any particular study.

Mr. WECHSLER. There were six tentative drafts submitted to the Institute plus a proposed official draft. So there were all in all seven printed drafts submitted to the Institute.

Senator GURNEY. Are we talking about the bill?

Mr. WECHSLER. No, I am talking about the segments of the work that ultimately became the bill because it was done on an installment basis over the years.

Now, those seven drafts, tentative drafts we call them, that were printed and distributed to the members, everything in those drafts had been reviewed at least once and frequently two or three times by the advisory committee first and then by the council of the Institute. So my guess would be, and it is a guess, we probably had 12 2- or 3-day meetings of the advisory committee during this period. The council, I would think, devoted at least 10 or 11 days of full-time effort to considering work that came to them from the advisers.

Now, all of those drafts are available but they are in a kind of mimeographed form.

Senator GURNEY. That was going to be my next question. Does the committee have the benefit of the drafts, the correspondence, the comments made by various people who were on this?

Senator BURDICK. Counsel states we have copies of tentative drafts but we don't have all of the personal correspondence back and forth.

Senator GURNEY. Is that very voluminous, Mr. Wechsler?

Mr. WECHSLER. Yes. May I say this, the final product is in this book which I am sure either has been made available or will be made available to all of the members of the subcommittee. This book contains not only the bill, the bill is here or rather the material that became the bill is here in about the first 98 pages and the rest of it, that is from page 99 to something like 540, is called commentary and this is the detailed explanation written by the advisers and their response to suggestions from the committee or the council members of the Institute. But the Institute doesn't vote on the commentary. The commentary attempts to give the background of everything in the proposals, the existing law, the nature of the changed proposal, the reasons for the change, and even an indication where the matter was controversial of the grounds for objections that had been advanced to the proposed changes and the arguments that were made, reference to where those arguments can be located in the annual proceedings of the Institute which are printed, and, finally, the grounds on which the particular compromise or resolution of the issues were reached.

Senator GURNEY. Well, that is excellent.

Mr. WECHSLER. That is all there and I would greatly doubt, except in the most unusual circumstances, that the committee would want to go very deeply into the matter as far as the preliminary draft, as we call them, but the material is available if they need it and any draft that is desired will be provided promptly by me on request.

Senator GURNEY. One final question, in looking over the membership of the advisory committee here, and I don't want to indicate in any way that I might have objection to any of these selections, but I am a little troubled when I see that almost all of the people on the advisory committee are located either in the Northeast or, in other words, they are big city lawyers. I think with the exception of one judge from the fifth circuit.

Mr. WECHSLER. Charles Merrill of the ninth circuit became a member of the committee.

Senator GURNEY. Where does he come from?

Mr. WECHSLER. Well, I guess he is probably a big city lawyer, too. He comes from Nevada and now lives in San Francisco.

It is only now that he lives in San Francisco.

Senator GURNEY. I noticed on the original committee there were no practicing lawyers at all, am I correct about that?

Mr. WECHSLER. You mean the committee as originally set up? Charley Horsky from the district was a member but he participated only in the early days. President Kennedy, I think, drew him into the White House staff and, as I said in my statement, he withdrew after that.

Senator GURNEY. I did notice two other lawyers were appointed later on—John Buchanan of Pittsburgh and Robert Stern of Chicago.

Mr. WECHSLER. John Buchanan of Pittsburgh and Robert Stern are both practicing lawyers and there was also a practicing lawyer from Chicago, Louis A. Kohn, who was included in the original group as Judge Goodrich recommended it but who unhappily had a stroke

almost at the beginning and was incapacitated I don't even mention his name in my statement but it is mentioned in the printed book.

I also mentioned Warner Gardner of the district who came in. I don't know if you know him. He is a partner of Francis Shay, who was for many years a Government lawyer and is now in private practice and has been for about 20 years. So we have Gardner and also Oscar Davis from the district, who was referred here as a judge of the court of claims and who was, as I recall, when the committee was set up, the senior career Government lawyer concerned with civil litigation and in that capacity has served for approximately 20 to 25 years.

It was only later that he became a judge and naturally we refer to him in terms of his present office. Then too, you have to remember that the judge, for instance, Judge Friendly, whom I mentioned earlier, was enormously active and successful and a real rough and tumble person at the New York Bar for far longer than he has been a U.S. circuit judge and the same thing is true of Judge Lord from the U.S. District Court for Eastern Pennsylvania, who has been a hard working trial lawyer but who was appointed to the bench just about the time when this study was initiated.

Indeed, I think it is fair to say that Judge Goodrich picked these men so well that almost as soon as any of them who weren't already judges were picked, some President named them for the Federal bench.

I think the group reflected more practical experience with litigation than would reasonably appear anywhere just by looking at the names listed here and their qualifications. But I felt in 1965 something of what you suggest because it was then that I, having succeeded Goodrich as director, asked Mr. Buchanan if he wouldn't come in and also Bob Stern, who I had known way back in my early years in the Department of Justice and who is presently not only a very active practitioner but also, as I said, for many years he was a very important career Government lawyer.

And in the council of the Institute, which reviewed these submissions, we had considerably more active practitioners.

Senator GURNEY. I noticed.

Mr. WECHSLER. They are mentioned on page 7 of my statement. For example, fellows like Bill Marbury of Baltimore who has never been anything but an active practitioner.

Senator GURNEY. I don't want to belabor the point. I know we have lots of other witnesses. Again, I want to reiterate, I think all of these men are some of the most distinguished people at the bar today and on the bench and that wasn't my point. My point was that I would have been happier if I had taken a look at that statement and seen a wide distribution geographically and also as far as the areas are concerned, of the population diversity.

Incidentally, I started out practicing law in New York so I had that experience. I also went to one of the Eastern law schools and so I had that experience also. I know there is a difference in the practice of law in the huge cities and in some of the less populous areas. And in revising the jurisdiction which covers the whole United States, we must also be aware of some of the various problems that arise in differing parts of the country. That was the only point I was making. I am sure we have an excellent council here.

Mr. WECHSLER. Well, I hope Professor Field directs himself to your understandable concern about this. He may have more to say about it.

Obviously the people who did the work are the people who did the work and they can't be changed now however helpful it might be in persuading the committee that the results are sound.

I do want to say that the Institute as a whole is a representative group. It includes people from all over the country. Indeed, in electing members, the Membership Committee, of which Francis Bird of Atlanta is chairman and the Council are very careful to insist upon a proper distribution of members from throughout the country. That is one of the things that the Institute has to offer. And it is the practitioners who dominate numerically in the Institute.

Now, the point that you have suggested is certainly going to be made. My old friend John Frank, who I found in the lobby this morning and who I think will appear before you at your next hearing—and when I say old friend, I really mean friend, and I think he will attest to our friendship, going back almost 30 years—but John has not been adverse to making this point because he lives in a small town named Phoenix, Ariz., and he reminds me of my old friend Mr. Justice Clark who thought it was effective, when he was in the Department of Justice, to begin each speech by saying of course I am a country lawyer.

So I say beware of these fellows who are just country lawyers. We all know that country lawyers are no different from city lawyers. As a matter of fact, it is the city lawyers who really have the greatest doubts about this bill. It is the fellows who are bringing damage actions for negligence, the plaintiff's lawyers, and I don't say this in any deprecating way, but it is they who think they get larger breaks in many parts of the country in the Federal Court who see red at the suggestions embodied in this bill.

I think it is only the fact that they now have something more important to worry about in no fault proposals that has somewhat diluted their efforts in opposing this bill. But they will be here before this committee. And I hope the Committee will recognize that some of the objections to the bill deserve to be treated with intelligent neglect.

Senator BURDICK. Well, thank you very much.

**STATEMENT OF ORISON S. MARDEN, ATTORNEY, WHITE & CASE,
NEW YORK, N.Y.**

Senator BURDICK. Our next witness is Mr. Orison S. Marden. Mr. Marden was born in Sea Cliff, N.Y., and was admitted to the New York bar in 1930. He is a member of White & Case and president-elect, Institute of Judicial Administration. He is also chairman of the board of the legal aid society and trustee of New York University and president of the Law Center Foundation, New York University.

Mr. Marden was past president of the American Bar Association from 1966-67; Association of the Bar of the City of New York, 1960-62; New York State Bar Association, 1964-65; National Legal Aid and Defender Association, 1955-59.

It is a pleasure to welcome you, sir. You may begin.

Mr. MARDEN. Thank you, Mr. Chairman. As the chairman has noted, I have been engaged in the active practice of law in New York City for nearly 41 years. The chairman very kindly invited me to come today and to present my views with respect to this proposed legislation.

I have filed a written statement with the committee. Anything I might add to that statement would, I think, be repetitive of some of the matters Professor Wechsler has touched upon, and I have too much respect for this committee to inflict repetition upon it, especially when the repetition will not be as good as the original.

Senator BURDICK. Well, your entire statement will be made a part of the record without objection.

(The statement of Orison S. Marden in full follows:)

STATEMENT OF ORISON S. MARDEN BEFORE THE SUBCOMMITTEE ON IMPROVEMENTS
IN JUDICIAL MACHINERY OF THE COMMITTEE ON THE JUDICIARY OF THE UNITED
STATES SENATE

My name is Orison S. Marden and I live at 11 Stonehouse Road, Scarsdale, New York. I have been engaged in the active practice of law in New York City for nearly 41 years. Your Chairman has invited me to discuss with you the Federal Court Jurisdiction Act of 1971 (S. 1876) which he has introduced in the Senate of the United States. He has asked me to place special emphasis on changes in the diversity jurisdiction of the federal courts as proposed in this bill. At the outset I should make it plain that the opinions expressed are my own and do not necessarily represent the views of any organization of which I now am, or have been, connected.

I believe that the provisions of S. 1876, taken as a whole, put the jurisdiction of the federal courts on a sound and rational basis. The basic proposals, in my opinion, will promote the best interests of federalism in the judicial branch of our national government. Ten years of study and hard work by some of America's finest legal minds have gone into the formulation of this legislation. The basic proposals of the study group have been shaped and refined by study and debate, on a line by line basis, by members of the prestigious Council of the American Law Institute and later by its members at annual meetings of the Institute. It is not often that a piece of legislation has had the careful consideration that has preceded the introduction of S. 1876 by your Chairman. Some of the proposals are more controversial than others and differences of opinion may well exist with respect to details. However, it would be tragic if opposition to detail should prevent enactment of the bulk of this much needed legislation.

Strange anomalies in the jurisdiction of our federal courts have been with us since these courts were created in 1789. Whether there was original justification for the distortions is beside the point. They cannot be justified today in reason or by any tenable concept of federalism. Moreover, the heavy case loads that now burden our courts suggest the need to review the current division of jurisdiction between federal and state courts. Changes in the assignment of various categories of cases from one system to the other may well permit more efficient and expeditious handling of those cases and thus relieve existing burdens to a substantial degree.

At present there are obvious distortions in the division of judicial business arising from the diversity jurisdiction of the federal courts. This substantial segment of the federal case load is composed of litigation which involves only the interpretation and application of state or municipal law. The original rationale for the diversity jurisdiction was the belief that local prejudice against an out-of-state litigant is more likely to be present in a state than a federal court.¹ No doubt there was basis for this fear in the early days of the Republic. And while local hostility to the out-of-state resident is less likely today, the mere suspicion that it exists probably justifies the continuance of this special protection for the traveler and the stranger.

Thus, when the amount in dispute exceeds the minimum sum prescribed by Congress from time to time, an out-of-state litigant always has had the right to invoke the jurisdiction of the federal courts in litigation with an in-state plaintiff or defendant.² But the out-of-state plaintiff may, for a variety of reasons,

See footnotes at end of article, p. 113.

choose to sue in the state rather than federal court. The in-state citizen, having no reason to fear local prejudice, is not permitted to remove the action to the federal court.³

This makes sense thus far, but now we enter the world of Alice in Wonderland. Notwithstanding the rationale for federal diversity jurisdiction, an in-state plaintiff, as the statute is at present drawn, may nevertheless invoke diversity jurisdiction and sue an out-of-state defendant in the federal court. Yet, as already noted, an in-state defendant, when sued by an out-of-state plaintiff, cannot remove the case to the federal court! This inconsistency between the treatment of an in-state plaintiff and an in-state defendant cannot be explained on any rational basis, even if we go back to the early days of the Republic. No one has yet devised any satisfactory rationale as to why the federal courts, conceived of as courts of limited jurisdiction under the Constitution, should provide a forum for local residents who, for some reason or another, do not wish to sue in the courts of their own state.

It had been held in the Third Circuit under the present statutory scheme that diversity jurisdiction could be manufactured by the simple device of appointing a nonresident administrator of the estate of a resident decedent.⁴ This case was subsequently reversed, in partial reliance upon the conclusion of the ALI study, but substituted a requirement that in each case a determination be made whether the appointment of the out-of-state fiduciary was for the purpose of creating federal jurisdiction.⁵

To the opposite effect, a resident may prevent a nonresident from removing an action from a state court by the simple device of joining a resident as a codefendant. So long as the claim against the in-state defendant is not completely groundless, removal by the out-of-state defendant is not permitted, even when he shows that the sole motive of the joinder was to avoid removal or that the in-state defendant is judgment proof.⁶ Such cunning devices are not helpful in maintaining the dignity and prestige of our courts, state or federal.

At the heart of S. 1876 with respect to diversity jurisdiction are provisions which will deprive the in-stater of the right to choose the federal forum when his adversary is an out-of-stater.⁷ At the same time, the proposal retains the right of a genuine out-of-stater to choose as between the federal court and the state court. Appointment of executors or other representatives in order to defeat or create federal court jurisdiction would be nullified, as diversity would depend on the citizenship of the decedent or the ward,⁸ and the prohibition against assignments to create jurisdiction would be strengthened.⁹ This legislation would prevent the device by which a plaintiff can forestall removal by a nonresident defendant by joining a resident defendant—a device, like the others mentioned, that exalts form over substance and is inherently destructive of the proper division between the federal and state judicial systems.¹⁰

Somewhat more controversial—and entirely separable—are two other proposals. One is to consider the commuter as an in-state resident when he seeks to invoke diversity jurisdiction.¹¹ Thus, a resident of New Jersey who has his place of business in New York would be considered a New Yorker for jurisdictional purposes in the federal courts sitting in New York state. Another is that the foreign corporation with a local place of business would be treated as a domestic corporation for jurisdictional purposes as to actions arising from its local activities.¹²

While these proposals, along with the basic one to deprive the typical in-state plaintiff of access to the federal court against an out-of-state defendant, generally would have the effect of reducing the diversity case load in the federal courts, the bill would enlarge the diversity jurisdiction in other respects. Partnerships and other unincorporated associations would be treated in the same way as corporations for jurisdictional purposes.¹³ This would open the federal court to cases now ineligible because one or more individual members of a partnership or association are citizens of the same state as an adversary party.¹⁴ Realistically, the purposes of diversity jurisdiction are better served if an association's principal place of activity is taken into consideration rather than the citizenship of perhaps just one of its many members. Also, under the bill, removal would be permitted if diversity exists between a nonresident defendant seeking removal and any plaintiff, regardless of the citizenship of other plaintiffs or defendants.¹⁵ Here again the proposal would implement the basic purpose of diversity jurisdiction to protect the out-of-state resident, regardless of the fortuity of who might be joined with him in a particular lawsuit.

Another salutary reform would permit otherwise ineligible cases to be brought in the federal court if they are companion rights of action to a principal claim properly brought in the federal court.¹⁶ For example, a husband's cause of action

for loss of services may be coupled with the wife's action for personal injuries, although the husband sues for less than the minimum jurisdictional amount. This provision, while not adding significantly to the federal case load, would serve to prevent duplication of effort by state and federal courts.

Another forward-looking proposal is to extend diversity jurisdiction to embrace controversies involving many parties, when some of those "necessary for a just adjudication" are beyond the reach of any single state and beyond the reach of any federal court under present venue and process requirements. Under the bill, diversity between any two parties opposed in interest is sufficient to confer federal jurisdiction.¹⁷

We can only speculate as to the net effect of the proposed redistribution of litigation on the case loads of the two judicial systems. It is likely, however, that fewer cases would be brought in the federal courts under the diversity jurisdiction. Closing the doors of federal courts to local plaintiffs should reduce the number of original diversity actions significantly.¹⁸ On the other hand, the enlargement of federal jurisdiction in other respects, particularly by the expanded removal provisions, would add a considerable volume to federal dockets.

The interpretation and application of federal law is the primary business of our federal courts. This function should be expanded in order to preserve uniformity in federal law and to protect the public against conflicting interpretation or application of federal law by state courts. S. 1876 would permit more actions involving the interpretation of federal statutes to be brought in or removed to federal courts.¹⁹

Conversely, our state courts should be the primary source of interpretation and application of state law. There is always the risk that federal courts, acting as required by *Erie v. Tompkins*, 304 U.S. 64 (1938), will misinterpret state law, leaving the losing party without redress to a state appellate court to correct the error. This legislation will have the effect of leaving to the state courts, in greater degree, the interpretation of state law and of permitting the federal courts to take an expanded jurisdiction over the interpretation and application of federal law.

Our failure to implement properly the basic distinction between the respective roles of the two systems is at least partly responsible, I believe, for the unfortunate tendency in recent years to downgrade the state courts in relation to the federal system. Practitioners have been too eager to file "state law" cases in the federal courts because "the docket is less crowded" or the judges or the jurors are "better." The assumption that one judicial system is or should be superior to the other is a highly dangerous disservice to the administration of justice in this country. It is erroneous in concept, because each system has supreme authority within its proper sphere. Indeed, under the *Erie* doctrine a federal court can only seek to determine how a state court would decide the case before it.²⁰

Professor James W. Moore states:

"The obligation to accept local law extends not merely to definitive decisions, but to considered dicta as well, and if explicit pronouncements are wanting, the federal court should endeavor to discover law of the state on the point at issue by considering related decisions, analogies, and any reliable data tending convincingly to show what the state rule is."²¹

Any attempt to make a man-to-man comparison of the two courts necessarily encounters exceptions that make any general conclusion of little value. Our constant endeavor should be to uphold the integrity and prestige of both judicial systems and to work for the day when only the best of the Bar are elevated to the Bench and the dockets of all courts are reasonably current.

The principal contention of those opposing the proposed changes in diversity jurisdiction seems to be that the diversity jurisdiction should not be contracted because federal courts and federal justice are generally superior to state courts and state justice. This is an assumption that is incapable of proof and may well be erroneous as a general proposition. Even if the assumption were true, it is of little relevance to the diversity jurisdiction, since the federal court has only the limited power of ascertaining how the state court would decide the case before it. More important, why should an instate plaintiff be entitled to avail himself of this supposed advantage just because the defendant is fortuitously from out-of-state? The critics of the provisions embodied in this bill never satisfactorily answer this question.

A second argument raised by opponents of the proposals is that the diversity jurisdiction works fairly well, and why change a good thing? However, if, as this bill contemplates, more cases involving purely federal questions should be allowed to be brought in or removed to the federal courts, it would be impossible for the

federal courts to absorb this added case load, which is their proper business, without a large increase of judicial personnel, unless there was a simultaneous curtailment of diversity jurisdiction.

Finally, opponents suggest that there are certain benefits in having the federal and state systems working together on similar problems and that the federal courts should not become specialized courts. This argument misconceives the nature of the changes that would be brought about by the adoption of this legislation; the bill would limit, not abolish, diversity jurisdiction. The federal courts will still have a large volume of diversity business and purely state law problems to handle.²²

The Federal Court Jurisdiction Act of 1971 would eliminate indefensible anomalies in the division of judicial business between state and federal courts. Enactment of this legislation would divide that business between the two judicial systems along logical and useful lines, in the public interest.

FOOTNOTES

1. *The Federalist* No. 80, at 534 (Cooke ed. 1961) (Hamilton): "It seems scarcely to admit of controversy that the judiciary authority of the union ought to extend to these several descriptions of causes . . . to all those in which the state tribunals cannot be supposed to be impartial and unbiassed."

2. The present provision is found in 28 U.S.C. § 1332(a).

3. The present provision is found in 28 U.S.C. § 1441(b).

4. *Corabi v. Auto Racing, Inc.*, 264 F.2d 784 (3d Cir. 1959), held that the appointment of an administrator for the purpose of creating diversity jurisdiction was not improper or collusive so as to deprive the court of jurisdiction under 28 U.S.C. § 1359, which prohibits collusive or improper conferral of jurisdiction "by assignment or otherwise."

5. *McSparan v. Weist*, 420 F.2d 867 (3d Cir. 1968); see also *Esposito v. Emery*, 402 F.2d 878, 882 (3d Cir. 1968).

6. See, e.g., *Illinois Central Railroad Company v. Sheegog* 215 U.S. 308 (1109); *Chicago, Rock Island & Pacific Railway Company v. Schwyhart*, 227 U.S. 184 (1913).

7. § 1302(a).

8. § 1301(b)(4).

9. § 1307.

10. § 1340(b).

11. § 1302(c).

12. § 1302(b).

13. § 1301(b)(2).

14. In *United Steelworkers v. R. H. Boligny, Inc.*, 382 U.S. 145 (1965), the Supreme Court expressed considerable sympathy for the A.L.I. proposal, but held that it was a matter for legislation, not court decision.

15. § 1304(b).

16. § 1301(e).

17. §§ 2371-2376.

18. Statistics gathered by the Administrative Office of the United States Courts demonstrate that 45.3 per cent of the diversity actions commenced in 1964 were begun by in-state plaintiffs: in 1968, the percentage was 45.9%. See American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts (1969) (hereinafter cited as ALI). Appendices B-1, B-2 at pp. 475-76.

19. §§ 1311-1315.

20. See, e.g., *Fidelity Union Trust Company v. Field*, 311 U.S. 169 (1940), in which the Supreme Court held that a federal court in New Jersey was bound to follow a decision of the New Jersey court of chancery, a trial court of state-wide jurisdiction. The Court recognized, but considered irrelevant, that the chancery court's decision might not be followed by higher New Jersey courts, as indeed it subsequently was not. See Clark, *State Law in the Federal Courts*, 55 Yale L. J. 267, 291-292 (1946).

21. 1A Moore, *Federal Practice* ¶ 0.307[2] at p. 3312 (2d ed. 1965).

22. According to the statistics of the Administrative Office of the United States Courts, more than 20,000 diversity actions either were commenced in or removed to federal courts in 1964, and more than 21,000 in 1968. See ALI, Appendix B, pp. 465-468. Even if half of these actions were excluded from federal jurisdiction under the ALI proposals, there would still be a large volume of state law cases remaining within the jurisdiction of the federal courts.

Senator BURDICK. Of course, we don't want too much repetition but perhaps you have some elaboration in mind that you might give us?

Mr. MARDEN. Sir, several observations have been made that I would like to say a few words about.

The Chairman referred to practicing lawyers liking to have options. Well, I am a practicing lawyer and I would like to have options too. I would like to have, selfishly, the option of picking the Federal court or the State court when I represent an in-State plaintiff. But the question I think your committee and the Congress has before it is whether that is in the public interest. And it is my view that it is not in the public interest.

Our Federal courts are flooded with litigation that properly should be in the State courts, courts which do have the final authority on what is the law of that particular State whereas the Federal courts do not have that authority and can only in some instances guess at what the State law is.

And I believe we have to put aside, when we are dealing with a subject as difficult and as important as the division of jurisdiction between our State and Federal courts, we have to put aside to the extent we possibly can, our selfish wishes to have all of the options open for us and consider what is in truth in the public interest.

I know of few instances where legislation has had as careful a combing over as your bill, Mr. Chairman, and by as prestigious a group of lawyers, judges, and academicians as this country can muster.

I happen to be a member of the American Law Institute and I have witnessed some of the debates on a line-to-line basis of this proposed legislation and I can assure you that every conceivable point of view has been presented in those debates. And I think the final result is a step forward and a big step forward.

Some think it does not go far enough in promoting the best interests of federalism in the judicial branch of the Government but in substantial measure it does leave to the States what is properly State business. I will be glad to try and answer any questions that any of the committee may have.

Senator BURDICK. Senator Gurney?

Senator GURNEY. Well, I am sorry to say that I haven't had the opportunity to read your statement, Mr. Marden, so perhaps I can't ask the questions very well. I did notice though one point made here that the heavy caseload is one of the reasons for examining this question of jurisdiction.

I guess Chief Justice Warren is also concerned about that. And the other point is the fact that the caseload in the State courts are ever so much higher than Federal court. There is no better example of that than the city of New York which is probably in a worse condition than any other city.

New York criminal dockets are somewhere around 4 or 5 years behind. We all know the chances of getting a criminal matter disposed of in New York are nil.

This isn't civil jurisdiction, of course, but it does point out dramatically the problem of the State courts. Now, I know in Florida, for example, our chief justice has written the committee commenting on this bill and he made this very point: Why throw more problems to

the State courts when they have already more than they can handle now?

In Florida, of course, our Federal dockets are far more current than our State dockets and we are doing a much better job with them. I must say that I really don't see the rationale of that. If the State dockets are worse off than the Federal dockets, how can we improve the administration of justice by making it worse?

That is just shifting the burden from one system to another.

Mr. MARDEN. I would put that reason, which has indeed been advanced, at a far lower level than the primary reason which is that this legislation would give a rational basis for division of jurisdiction. It is wrong for the Federal courts to have to guess at the law of the State of Florida when that law has not clearly been pronounced by the highest court of your State. That is a question for the Florida courts.

And so much of this litigation now pending in the Federal courts involves primarily the State and municipal law of a State such as Florida and that belongs in the Florida courts.

Now, of course, we have congestion. We have congestion almost everywhere in the big metropolitan centers. But we are not going to attack that problem at its roots by juggling the cases around. We have to meet it head on in other ways. I think I have seen somewhere in the ALI study a figure that indicates that if the cases that would be eliminated by this bill were transferred to the State court, that it would be a very minute figure, and it would make a very minute difference in the caseload of the State courts.

Senator GURNEY. Well, I don't disagree with your rationale at all. I agree with it but I am simply pointing out the argument that the Federal courts are overburdened. I don't think that has any part really in this bill of what we should be putting into or keeping out of it. I think the other things are the important things to consider, that is, what really is Federal jurisdiction and what really is State jurisdiction.

Mr. MARDEN. I agree with you.

Senator GURNEY. Well, I guess we are talking about the same thing. I do think though that the committee probably ought to consider that business about how many more cases are going into the State courts and I would hope your analysis is a fact because I think we had better do something about getting the State courts to do their job before we overburden them with any more. I know the Chairman and I have very comprehensive bills before this committee which would help jack up the State courts and get them to do their job by providing some Federal aid, but I know as far as I am concerned, there is nothing that troubles me more than the utter and complete breakdown of justice in the United States, especially criminal justice, because of the overburdened court system.

And unless we do something about it in a big hurry, we are indeed I think going to regret this situation, as a so-called law-abiding nation.

I have no further questions.

Senator BURDICK. I was concerned too about that when I first heard these proposals that the judicial load falls upon the State courts and for that reason I have had the staff do a detailed study of what the problem of impact would be.

First we have to consider that the States are going to lose some business in the transfer of Federal questions so that will take some of the burden off. And on the increase in States business by virtue of the

change in diversity rules, the findings so far indicate not a great increase in workload. It is estimated now about 1 or 2 percent.

Before these hearings are over we'll have this breakdown and we can talk about it some more at that time. It was a concern of many people that that might add heavily to the overburdened State systems. Apparently it is not going to be as heavy as we thought though.

Mr. MARDEN. I hope not.

Senator BURDICK. I just have one or two questions.

In your view, do you agree the proper role of diversity jurisdiction should restrict in-State plaintiffs from invoking diversity jurisdiction?

Mr. MARDEN. Yes, I do. I think that is not in the public interest. You will find many lawyers saying we like very much to have a choice, and I do myself at times for clients, but I do not think that is in the public interest. I do not think it promotes federalism or is based on good sense or has any rationale basis. It is one of those things that has crept into the system that doesn't belong there.

Senator BURDICK. Another argument that we hear from time to time is that you get better treatment and better quality of justice dispensed at the Federal courts than the State courts. What do you say about that?

Mr. MARDEN. That is a matter of opinion. It depends on the local situation. I myself deplore that point of view because it has become too prevalent in this country and I think it has tended to downgrade our State courts as against the Federal courts, which I think is against the interest of this country as a whole.

Our actions and our goals as lawyers, as legislators, and as citizens should be to upgrade all of the courts, to put better judges on the bench wherever we can and to improve our judicial machinery at both the State and Federal level. But to compare one system to the other system, I don't think anyone can prove that one system is better than the other speaking of the country as a whole.

The bench is made up of human beings and human beings differ in their abilities and their points of view and one will have an opinion as to whether judge so-and-so is a better judge than judge so-and-so, and others may differ. That is a view which I do not think is true looking at the two systems in the country as a whole. I think such broad statements are a terrible libel on the American people and a condition that behooves us all to correct.

Senator BURDICK. Well, I can't agree with you more. We have a dual court system in this country and I think we need quality of the judiciary in both areas. So, I don't follow that thinking either but the question has been raised.

How long have you been in the practice of law, sir?

Mr. MARDEN. Nearly 41 years.

Senator BURDICK. General practice?

Mr. MARDEN. Principally commercial litigation, trade regulation, securities litigation, antitrust, mainly business litigation—State and Federal courts.

Senator BURDICK. Thank you very much.

Mr. MARDEN. Thank you, Senator.

Senator BURDICK. The committee will stand adjourned.

(Thereupon at 11:45 a.m. the hearing was concluded.)

THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS

WEDNESDAY, SEPTEMBER 29, 1971

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN
JUDICIAL MACHINERY OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2228, New Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senators Burdick and Gurney.

Also Present: William P. Westphal, chief counsel; Michael J. Mullen, assistant counsel; Kathryn M. Coulter, chief clerk.

Senator BURDICK. The committee will come to order.

STATEMENT OF RICHARD H. FIELD, PROFESSOR, HARVARD LAW SCHOOL, CAMBRIDGE, MASS.

Senator BURDICK. Our next witness is Prof. Richard Field who is a professor at Harvard Law School. He graduated from the school and was an editor of the Harvard Law Review. He was admitted to the Massachusetts Bar in 1929 and was in private practice from 1929-42, attorney with O.P.A., Boston, Mass. from 1942-43; General Counsel, Washington, D.C., 1943-46, visiting professor, Harvard, from 1946-47 and a professor since 1947.

He was Visiting American Professor, Institute of Advanced Legal Studies University of London, 1970-71. Author, with Prof. Benjamin Kaplan, of Materials on Civil Procedure, 1968. Member of the American Law Institute Reporter, advisory committee, Maine Rules of Civil Procedure, 1957-59, and chief reporter for the American Law Institute, Division of Jurisdiction between State and Federal Courts from 1960-69.

That is a very impressive background, Professor, you may proceed.

Mr. FIELD. Thank you, Mr. Chairman. I think I should say a word about my background first.

When the American Law Institute was looking for a reporter for this study, they started looking at people who had a lot of experience in Federal-State litigation. They found unfortunately that most of the people they first looked at had written extensively in this field and the one thing that they did not want to get was a prefabricated opinion by employing someone to do this job who had already committed himself on paper as to the problems involved.

So in a sense when I was picked, I was picked for my ignorance rather than for my learning. At least, while I had ideas, none of them were very firmly set and most of all I had not publicly expressed any of them, so I was picked more as an interested neutral rather than as a committed advocate.

Indeed, what I said to Judge Goodrich when he offered me the appointment was, "Why me?" And he said in substance what I have told you.

I might add one further personal word. As Professor Wechsler said, we attempted to make a disinterested approach in the public interest as we viewed it. In other words, we aimed to and did propose what we thought was right. This anecdote is, I think, in point. Justice Frankfurter, who had been my teacher at law school wrote to me immediately upon my appointment, and he said I was being employed not as a political expert, not as one who is supposed to be able to judge what was politically acceptable. It was my job, he said, to do what was right in my view and let the chips fall where they may.

He said he would be glad to talk with me about it because he did have some ideas where the chips should fall and I in all friendliness and with great respect said that I wanted to know a lot more about it before I exposed myself to his persuasive words.

And I waited a good length of time before I was willing to talk to him. He was, it is fair to say, somewhat disappointed in the product because he thought that my judgment of what was right would coincide more closely with what he thought was right, and that would have meant an abolition of the diversity jurisdiction as something that had outlived its day.

We did not come to that view. And I hasten to say, we did not come to that view on any other grounds than, as Professor Wechsler has said, what we thought was the appropriate balance in the light of the basic principles of federalism. It was our job to see what those principles were and to comport to them. This is what we did.

Like the previous witness I have already submitted a statement which I understand, Mr. Chairman, will be made a part of the record. I have no desire to repeat it nor do I have any desire to do what you, Mr. Chairman, did in your speech introducing this bill when you ran through a summary of what it does.

I think it was a fair and objective statement, if I may say so, and I hope to be fair today but probably less objective than I would be if I were not here today as an advocate. I want to also add my statement is as fair and objective a statement as I could make it.

Senator BURDICK. The statement will be placed in the record without objection.

(The statement of Richard H. Field follows:)

STATEMENT OF RICHARD H. FIELD

I am testifying at the request of the Committee because I was Chief Reporter of the American Law Institute's "Study of the Division of Jurisdiction between State and Federal Courts." The bill now before you, S. 1876, was taken without significant change from the revision of the United States Code proposed by the ALI as a result of that Study. I am naturally in substantial accord with the proposal, but I come here as an individual and not as a representative of the ALI. As to my qualifications, I should say that I was in private practice largely involving litigation in state and federal courts for 13 years, that I then served the government as New England Regional Attorney and General Counsel of the Office of Price Administration from 1942 to 1946, and that since the war I have been a pro-

fessor of law at the Harvard Law School teaching mainly in the field of civil procedure.

Your chairman in introducing S. 1876 gave a detailed summary of the provisions of the bill, and at the request of the Judicial Conference of the United States I provided a summary of the ALI proposals, which was published in 46 F.R.D. 141 (1969). I do not intend to offer you another summary, but rather to speak in broader terms about what the legislation would accomplish and why I believe that it would lead to a fairer and more logical division of business between state and federal courts. I am advised that this portion of the hearings is to concentrate on the provisions concerning diversity of citizenship. I am sure that this committee will ultimately consider the bill in its totality, and I should like to emphasize the importance of looking at its impact as a whole on the jurisdictional balance between the federal and state court systems. As suggested by Chief Justice Warren, the ALI has attempted to assign to each system "those cases most appropriate in the light of the basic principles of federalism."

We proceeded from the outset on the firm premise that access to the federal courts on the basis of diversity of citizenship should be permitted only upon a showing that it lies within the Constitutional purposes of diversity jurisdiction and should extend only to include those purposes. The classic reason for the constitutional grant of diversity jurisdiction was the protection of nonresidents against local prejudice or the apprehension of such prejudice in the state courts. This does not appear to have been disputed, even by those who oppose the ALI proposals. The proposition central to our Study was that such diversity jurisdiction as is maintained should have some functional connection with the fact that the parties are of diverse citizenship.

This proposition has not been universally accepted. The argument has been advanced that the federal courts are better courts, with better judges and better procedures, and that the more cases tried in these better courts the better. Carried to its logical conclusion, which it rarely has been, this would mean that the federal courts should be open to any case within constitutional limits that any party, plaintiff or defendant, wants to take there. The jurisdictional requirement of amount in controversy, for instance, would be done away with, as well as the various devices for the manufacture of diversity jurisdiction by assignment and otherwise. I cannot believe that Congress would countenance any such wholesale reordering of federal jurisdiction with its inevitable destruction of the the dignity and prestige of state courts and disruption of federal-state relationships. Hence I return to the question of what diversity cases have a valid contemporary justification for being in the federal courts.

The very heart of the present bill is the provision of section 1302 that would prevent a person from invoking diversity jurisdiction in the federal court in his home state simply because his opponent happens to be an out-of-stater. It is the most far-reaching in terms of the number of cases involved. Something approaching half of the diversity cases in recent years have been brought by in-state plaintiffs against out-of-state defendants. It is also the provision that has been most violently attacked. I appreciate the unhappiness of lawyers commonly representing plaintiffs over the loss of the option to go into their home federal court if they choose. As a practicing lawyer I liked that option myself. But it does not seem to me responsive to any acceptable justification for diversity jurisdiction. Surely the local citizen cannot claim that he will suffer prejudice in his own state courts because his adversary comes from outside the state. The reasons for deciding whether to sue in federal or state court are in fact purely tactical—such factors as relative congestion of trial dockets, relative geographical convenience of the courts, prediction as to the likely difference in verdicts, differences in appellate control over the size of verdicts, the permissibility of a less-than-unanimous verdict, and difference in availability of discovery devices. (As more and more states adopt discovery devices patterned on the federal rules this is becoming less consequential.) I do not believe that these tactical considerations are a justification for letting the local plaintiff take advantage of the fortuity of his opponent's out-of-state citizenship in order to get into the federal court.

On the other hand, I believe that there is valid contemporary justification for continuing diversity jurisdiction as a means of protecting the out-of-stater against prejudice or the fear of prejudice against him as an outsider. Many have urged that general diversity jurisdiction has served its original purpose and should now be abolished. Insofar as the necessity of assuring federal justice to out-of-state travelers in order to encourage free movement and business activity throughout the country is concerned, that objective has been spectacularly achieved. In these days state boundaries are crossed and recrossed by land or by air without thought or even awareness. Social and economic incentives to interstate movement and

business are so great as to override concern about possible injustice in state courts. I would nevertheless deplore the abolition of the jurisdiction, nor was there a voice raised in support of it at any stage of the ALI proceedings.

The traveler from another state has always had the protection of a federal court against local prejudice and other inadequacies of state justice. The struggle to free our society of prejudice is far from won. Indeed, it may be that there is more visible prejudice than there was a generation ago—racial, religious, economic, and to some extent geographical prejudice. Unhappily, there is in many parts of the country, particularly in close-knit small communities, prejudice in favor of the local man against the outsider. State venue provisions often localize the place of trial in constituencies where the provincialism of the local judge and jury tend to deprive the stranger of a fair day in court. This is the very kind of bias that the diversity jurisdiction was designed to guard against.

There is no magic, of course, about crossing a state line that makes prejudice appear or disappear. There may be prejudice in favor of the local man against the man from beyond the next row of hills in the same state; there may be none against the man who lives across one or more state lines. Hence the diversity jurisdiction is an imprecise instrument. It cannot, because of constitutional limitations, protect the in-state victim of insular prejudice. It gives the option of choosing a federal forum to some who do not deserve it in terms of prejudice or fear of prejudice. I see no satisfactory escape from this. It is simply not workable to have the right of access to a federal court determined on a demonstration of prejudice in the individual case. Diversity jurisdiction must be based on categories of cases. The ALI proposals deprive the in-stater of the right to choose a federal forum when arrayed against an out-of-stater, but give this choice to out-of-staters as a class. We include in the class, however, only those whom I will term genuine out-of-staters.

The reference to genuine out-of-staters brings me to section 1302(b), which would also cut down diversity jurisdiction. This subsection would reduce diversity jurisdiction by limiting the extent to which foreign corporations, partnerships, unincorporated associations and sole proprietorships can invoke it, originally or on removal. Under existing law a foreign corporation can, unless its principal place of business is in the state, remove an action to federal court or sue there as a plaintiff so long as diversity of citizenship exists. This subsection reflects the belief that a foreign corporation may have such an involvement in a state that it is no longer entitled to a stranger's right to a federal forum. When a corporation makes the business decision to locate a substantial establishment in a state, it must take into account such local laws as workmens' compensation acts. It should equally be required to take into account the quality of the state court's administration of justice and hence not be allowed to invoke diversity jurisdiction. This is less obvious than the exclusion from the jurisdiction of the in-state citizen, but we believe it to be no less sound. We do not think the A & P market or Safeway store is any more entitled to get into federal court than the competing locally incorporated chain of markets. I doubt whether a customer—or, perhaps more to the point, a juror—would know or care where any of these chains is incorporated. An injured plaintiff may have an advantage against any of them because of sympathy for an individual as against a large corporation, but not by reason of the corporation being a foreign one.

Once the principle is accepted that a foreign corporation may so identify itself with the life of a state that it is no longer entitled to the stranger's right of access to federal court, there comes the sticky problem of definition. The ALI Commentary says in this connection that it is of first importance to have a definition so clear cut that it will not invite extensive threshold litigation over jurisdiction.

We have been charged with having violated our own precept. We used the phrase "local establishment" and proceeded to define it. The choice seemed to us to be between a generalized statement of the necessary relation of the enterprise to the state, which would plainly produce litigation—breeding uncertainty, and a detailed enumeration of specified types of activity. We chose the latter course, well aware that this degree of specificity might result in some differentiations in treatment that would appear somewhat arbitrary. The "local establishment" has to be a fixed place of business in the state where the listed types of activity are conducted. The recurring theme in this enumeration is that of dealings with persons within the state of a type almost invariably competitive with local enterprise, and visibly so. The inclusion of a fixed place of business for production or processing departs from this theme, since it may well not involve direct competition with local enterprise except in the labor market. But such an establishment is commonly a very substantial one and the financial commitment great. It seems particularly fitting that such an enterprise be regarded as having

entered sufficiently into the life of the state to be denied the stranger's right to a federal forum. In all these cases we require a two-year period of maintaining the establishment before depriving the organization of its right of access to the federal court. Finally, for the occasional border-line case that may give rise to litigation, section 1386(a) provides for the early raising and foreclosure of jurisdictional issues. Thus a claimed jurisdictional defect cannot be concealed and made a booby-trap for the unwary.

By limiting denial of access to the federal court to claims arising out of the activities of the local establishment, we provide safeguards against undue imposition. An organization engaging in small-scale activity in a state, even though the "local establishment" test is met, can invoke federal jurisdiction with reference to claims arising elsewhere. It does not seem unfair to require such an enterprise to litigate in the state court claims arising out of its local activity.

Section 1302(c) provides another category of out-of-state citizens to whom these proposals would deny access to a federal court. The commuter to a metropolitan area like New York is in no realistic sense an out-of-stater merely because he crosses a state line in order to reach the place where he earns a living. Insofar as the purpose of diversity jurisdiction is to protect from possible prejudice against strangers, the regular worker in the city is hardly a stranger among those who reside there. Can it be seriously urged that the commuter from Greenwich will fare worse in New York state court than one from Scarsdale? The point is that both are part of the same metropolitan community, and the fact that one of them elects to live in a suburb across a state line does not sufficiently differentiate him from his co-worker to justify giving him the right to litigate in a federal court. Therefore the Institute proposals would treat the commuter in the same way as a citizen of the state to which he commutes for purposes of measuring his right to a federal forum. This provision is of practical consequence only in those districts centered in a metropolitan area transcending state lines. It has been referred to as a gimmick not worth the trouble it would cause. But it seems to me logically sound and it would keep out of the crowded federal courts of the large metropolitan centers a large number of cases where the justification for resort to federal court is weak.

One further provision for reducing the volume of diversity jurisdiction should be mentioned, although recent development of case law makes it less consequential than it was when first proposed. Section 1301(b)(4) makes the citizenship of the decedent in a wrongful death action controlling for diversity purposes rather than that of his executor or administrator. The citizenship of a guardian or other like representative of an infant or incompetent is similarly disregarded. The purpose was to prevent the manufacture of diversity by appointment of an out-of-state personal representative, a practice which had become common in some states, most notably Pennsylvania. A line of cases in the Third Circuit had held that this was not an improper or collusive means of obtaining jurisdiction within the terms of 28 U.S.C. § 1359. *Corabi v. Auto Racing, Inc.*, 264 F. 2d 784 (1959); *Jamison v. Kammerer*, 264 F. 2d 789 (1959). In the latter case the court noted that the same person had been named as administrator in thirty-three other actions in the same district court in order to create diversity jurisdiction. These cases were overruled in *McSparran v. Weist*, 402 F. 2d 867 (1968), which held that the appointment of such a fiduciary of divergent citizenship for the purpose of creating diversity was improper and collusive and thus failed to support the jurisdiction of the district court. Although this holding eliminates the worst part of the problem dealt with by the proposed subsection, it does not dispense with the need for legislation. The *McSparran* decision would require a factual determination of the purpose of this appointment of the out-of-state fiduciary, which might in some cases be difficult. The present proposal would obviate the need of any factual inquiry. Moreover, it would work both ways and would apply equally to appointments made to defeat federal jurisdiction as well as those that would create it. There have been instances where a decedent and his potential adversary were of different citizenship and a party wanting his case to be frozen in the state court has secured the appointment of an administrator of the same citizenship as the adversary. This tactic would no longer be possible under the proposed subsection.

These are the chief proposals made by the bill on the question of access to the federal court. There are some other changes of a relatively minor nature and some clearing up of ambiguities in the present law, none of which I would expect to be controversial. I am not including them in the present statement but I would of course be glad to discuss them to the extent that the committee wishes.

Returning briefly to what I have termed the very heart of the present bill, the provision barring invocation of diversity jurisdiction, originally or on removal, by a party in the federal court of his home state, would correct one anomaly in diversity jurisdiction that I have never understood, although it has existed since the Judiciary Act of 1789. A citizen plaintiff has always been allowed to sue an out-of-state defendant in his home federal court; a citizen defendant has never been allowed to remove a case to that court. I can see no principled basis for this difference. Certainly plaintiffs as a class do not deserve preferential treatment over defendants as a class. Common fairness dictates equality of treatment. This equality could of course be achieved by broadening the citizen defendant's right of removal. The way to correct the disparity in the light of the conceded original purpose for creating diversity jurisdiction is to treat local plaintiffs in the same way that local defendants have been treated from the beginning. Neither should be able to come into the federal court for protection against the state courts of his own state.

In the outcry over this proposal, which admittedly has a substantial effect on the way that trial lawyers quite properly have utilized in their clients' interest the option in choice of court now open to them, it was frequently asserted that we were hostile to diversity jurisdiction. Little attention was paid to the fact that in several material respects our proposals would broaden diversity jurisdiction. I should like to enumerate them here.

First, the bill would extend diversity jurisdiction to provide a federal forum for actions in which state courts cannot do adequate justice because the parties needed for a just adjudication are beyond the reach of any single state, and also beyond the reach of any federal court under the present venue and process requirements. When the ALI proposed this new head of multi-party, multi-state diversity jurisdiction, we urged that "minimal diversity"—that is, diversity between any two parties opposed in interest—should suffice, despite the pronouncement of Chief Justice Marshall in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 435 (1806), that complete diversity of all parties opposed in interest was required. Thereafter the Supreme Court accepted this proposition, in the context of interpleader, and cited with approval the ALI memorandum arguing that the *Strawbridge* result was not of constitutional dimension.

Second, the bill would by section 1304(b) render ineffective the device by means of which a plaintiff, preferring a state court, could forestall removal by a nonresident defendant by joining as a defendant a co-citizen of the plaintiff. It provides that any defendant who would have been able to remove if sued along by the plaintiff in a state court can remove the entire action despite the joinder of another defendant who is either unable or unwilling to remove. The proposal was built upon the premise, just referred to, and now accepted by the Supreme Court, that the *Strawbridge* requirement of complete diversity was not demanded by the Constitution. This proposal would surely add substantially to the number of diversity cases. It must be understood that it is dependent upon enactment of section 1302 barring invocation of jurisdiction by a corporation with a local establishment. Otherwise it would pretty clearly flood the court with removed cases. Under present law a kind of rough justice may be achieved by joinder of a resident servant or agent to prevent a foreign corporation with an establishment in the state from getting into a federal court where in our view it does not deserve to be. Under this bill the device would be unnecessary because the locally established foreign corporation could not remove anyway. When the corporate defendant is what I have referred to as a genuine out-of-stater, it seems to me that it should have the right to remove despite the presence of an in-stater as a co-defendant. An in-state defendant may now be joined either with a resident servant to frustrate removal or with a resident whom the plaintiff would want to join irrespective of removability. For example, in a motor-car collision the prudent plaintiff will want to join everyone against who he has a chance of establishing a claim. When one of the drivers is an out-of-stater, he will usually be joined with a resident driver and thus under present law locked in the state court. Ironically, in this last situation, there may be real prejudice. The jury may in effect be deciding whether to hold the local driver or the foreign one liable. If, as we propose, only the genuine out-of-stater can claim the stranger's right of removal, he should in fairness have the right irrespective of the presence of a local co-defendant and regardless of the motive of joinder. The number of additional cases getting into federal court under this proposal is hard to forecast. It may be so great that reconsideration will be called for, but my best guess is that it will not.

Third, section 1302(b), already discussed as one of the steps that would cut down diversity jurisdiction, will, so far as it applies to unincorporated associations, actually add more cases than it eliminates. Under existing law the citizenship of each member of the association governs in determining whether diversity exists. This means that diversity is destroyed when any member is of the same citizenship as an adversary party. *United Steel Workers v. Bouligny*, 382 U.S. 145 (1965) illustrates the problem. A labor union with its principal place of business in Pennsylvania was sued by a North Carolina corporation in a North Carolina state court. Removal was denied because some of the union members were citizens of North Carolina. Under this bill the union would be treated as a citizen of Pennsylvania, its principal place of business, and diversity would exist. The union would be denied access to a North Carolina federal court only if its principal place of business were in North Carolina. It is worth noting that the Court in *Bouligny* indicated sympathy with the argument that the union should be treated as a citizen of Pennsylvania but said that this argument for extension of diversity jurisdiction ought to be made to Congress and not to the court. The opinion cited the ALI proposal that would achieve this result.

Fourth, section 1301(e) of the bill would extend diversity jurisdiction so as to cover the situation where a plaintiff has a claim within diversity jurisdiction and there are members of the family with companion cases arising out of the same transaction or occurrence. The companion cases do not on their own satisfy all the jurisdictional requirements, typically that of amount in controversy. Although case law in the area is not uniform, federal jurisdiction is often denied to these companion cases. This bill would bring them within diversity jurisdiction, so that if a wife brings a diversity-based action for injuries sustained in an automobile accident, her husband's claims for property damage, loss of consortium, and the like, can be joined in federal court with the wife's claim, although standing alone they would not satisfy the jurisdictional amount. This proposal is a conservative one. It is merely a codification of a rule, already reflected in some decisions, that will permit joinder where the need is particularly manifest. It is not intended to imply a negation of judicial development of a broader rule of ancillary jurisdiction, of which there have been several instances since the ALI proposals were made. If a case is properly in the federal court on its own, there is much to be said for joining with it other claims arising out of the same transaction or occurrence in the interest of judicial economy. There is, however, the danger that the ancillary concept might be carried to the point of seriously undermining jurisdictional requirements other than the amount in controversy, and in particular the non-involution provisions of section 1302.

Fifth, section 1304(c) of the bill would upset existing case law and allow the plaintiff to remove on the basis of a counterclaim asserted in the state court, if as a defendant he would have been able to remove had he been sued on that claim. Furthermore, under section 1304(d) removal would be allowed by a party with a claim in excess of the jurisdictional amount if it arises out of the same transaction or occurrence as the other party's claim and the sole reason why the action would not be removable is the failure of the other party's claim to satisfy the jurisdictional amount. This would put an end to the unseemly race to the courthouse to bring suit on a small claim for the purpose of foreclosing a large adverse claim in the federal court. Although the need for this proposal is most poignant when the state has a compulsory counterclaim rule, this factor is not made determinative. Even if the counterclaim is not compulsory, the potential federal claim may be defeated by prior adjudication of the state court action on the principle of collateral estoppel.

Sixth, under section 1307(b) the use of assignments of interest to defeat federal jurisdiction is blocked by providing that jurisdiction of an action shall be determined as if a transfer of interest had not occurred whenever an object of the transfer has been made to enable or prevent the invoking of federal jurisdiction. In *Kramer v. Caribbean Mills*, 394 U.S. 823 (1969), the Supreme Court held that an assignment made for the purpose of creating diversity jurisdiction was properly disregarded under 28 U.S.C. § 1359. Statutory treatment is necessary, however to cover the transfer an object of which is to defeat federal jurisdiction. The factual problem is simplified by use of the words "an object" rather than "the object" or "a substantial part of the object" or some similar phrase. In *Kramer* counsel candidly acknowledged that the assignment was in substantial part motivated by a desire to make diversity jurisdiction available.

I believe that each of these enumerated instances is a proper extension of diversity jurisdiction, consistent with enlightened principles of federalism, just as I believe that the provisions narrowing the jurisdiction eliminate only cases for which no valid contemporary justification can be shown.

The scope of federal process in general diversity cases is not dealt with in this bill. It is within the ambit of the rule-making power and the ALI accepted the suggestion that, consistent with past practice, it should be left to the rule-makers. We made it clear, however, that it was our belief that federal process should generally continue to be, as it now is, coextensive in scope with that of the state in which the federal court sits. Without questioning Congressional power to provide nation-wide service in general diversity cases as it has done in some federal question cases and in interpleader, it seemed to us unwise to allow it when the forum state does not. The effect of doing so would be to open the federal court to a large volume of cases from those states that do not have a so-called "long-arm" statute permitting the state to maintain jurisdiction over a nonresident with respect to claims arising from his activity within the state so long as notice is given to him which will satisfy the requirements of due process. These long arm statutes have been enacted in a majority of states and the number is constantly increasing, so the problem is a disappearing one. We think it would be a mistake to lessen state incentive to pass such legislation by now opening the doors of the federal court to in-state plaintiffs who would prefer to be there. The Federal Rules of Civil Procedure now provide for service beyond state lines to a point not more than 100 miles from the federal court house, primarily to cover metropolitan areas spanning more than one state. We do not believe that this development should extend farther except in a situation, such as interpleader at present and our proposed multi-party, multi-state diversity jurisdiction, where the defendants necessary to a just adjudication are so dispersed as to be beyond the reach of any single judicial forum, state or federal, and there is some diversity of citizenship among the parties. Here is a constructive and valuable use of the diversity power that meets a plain need.

The bill does contain in sections 1303, 1305, and 1306 provisions with respect to venue and change of venue that have as a practical matter some bearing on the cases the federal court can hear. A significant change is to make a proper venue a district where a substantial part of the events or omissions giving rise to the claim occurred, or where a substantial part of property that is the subject of the action is situated. Congress has already provided this in substance by making venue proper in the district "in which the claim arose." 28 U.S.C. § 1391(a) as amended by Act of Nov. 2, 1966, 80 Stat. 1111. We believe that the formulation proposed in this bill is an improvement over the language of the present law. The phrase "in which the claim arose" carries the implication that there is only one such district. In fact there may well be more than one district having a substantial connection with the matters in suit. The bill avoids the potentially litigation-breeding test of the present law. It is true that there may be controversy over what constitutes "a substantial part," but this is most likely when the plaintiff is taking a deliberate chance in an effort to gain a desired forum. If his choice is challenged and is found to be improper, section 1306(a) offers him an avenue of escape by transfer to a proper district.

The residence of plaintiffs, a proper venue under present law, is naturally eliminated because plaintiffs are being denied access to the federal courts of their home state under section 1302(a). The district where any defendant resides if all defendants reside in the same state is also a proper venue, as it is under existing law. Where the events giving rise to the claim arise outside the United States, so that the place-of-events provision cannot be applied, venue is made proper where any defendant resides. This is in order to avoid the anomaly of having cases within the jurisdiction of the district courts for which there is no possible venue.

Section 1302(b) in terms restricts the venue in actions against corporations. Present law makes a corporation a resident for venue purposes of all districts where it is doing or is licensed to do business. This breadth of choice of forum allowed a plaintiff suing a corporation with nationwide business activity has not been seriously objectionable in the past because typically the plaintiff would be suing in a district court of his home state on a claim arising there. Since this will no longer be possible, it seems essential to limit corporate venue so as not to permit the plaintiff to shop at large for a federal forum for an action most appropriately brought in his home state court. Accordingly the bill provides that the residence of a corporation for venue purposes is the district where it has its principal place of business or, if it is incorporated in a state other than where its principal place of business is, in any district of the incorporating state. Since the place of events is a proper venue, a corporation is not protected by this residence limitation against suit in a proper district. A corporation now suable in any district where it does business will be amenable to process in any such district and the venue will be proper if the events occurred there.

Finally, section 1303(c) makes an action for trespass upon or harm done to land transitory and subject to the ordinary venue provisions. This is a legislative repudiation of the anachronistic rule of *Livingston v. Jefferson*, 15 F. Cas., 660 (No. 8411) (C.C.D. Va. 1811). In that case Jefferson was sued in Virginia, the district of his residency for damages for trespass to land in Louisiana. Chief Justice Marshall, although he recognized the injustice of the result, felt constrained by the old common law concept of "local action" to rule that the suit could be maintained only in Louisiana. Since Jefferson was not amenable to process in Louisiana, and would doubtless remain so, Livingston was left with no place to sue. This dubious precedent has always been followed in the federal courts, and the change proposed in this bill is long overdue.

Section 1305(a) makes the convenience of parties or otherwise in the interest of justice the sole test for change of venue on the defendant's motion. It knocks out the present provision limiting transfer to a district where the action "might have been brought," together with the restrictive interpretation of these words in *Hoffman v. Blaski*, 363 U.S. 335 (1960), which greatly cut down the utility of the transfer device. Section 1305(b) prevents transfer to a district in which all parties would be barred by the non-invocation provision of section 1302. Otherwise the policy of the latter section might be frustrated by transfer. If such district is found to be the one appropriate place for trial, the court is required to stay proceedings if it can do so on terms and conditions that will assure the plaintiff an opportunity to maintain suit upon the claim in an appropriate state court. It is further provided that any attachment, garnishment, or like remedy obtained by the plaintiff in federal court is to be preserved and made available in aid of execution of any judgment on the claim in a state court. Section 1305(c) codifies the result reached by the Supreme Court in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), providing that the transferee court shall apply the choice-of-law rules that the transferor court would have been bound to apply. Under the compulsion of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), these are the rules followed by the state courts of the transferor district. The effect is to preserve to the plaintiff the benefit that traditionally he has had in the selection of a forum with favorable choice-of-law rules.

A final word, not directly germane to this bill, may be appropriate. There is room for federal legislation making a federal question in situations where a uniform national rule is desirable instead of the present variations of state law when the action is in either a state court or a federal court on a diversity basis. An example is legislation with respect to airplane crashes. Such actions could then be brought in or removed to a federal court, and federal law would be controlling if it were left in a state court.

This suggestion is in accord with the proposition central to the entire ALI Study that federal courts should be open to all parties for decision of questions of federal law, whereas they should be open to diversity cases only if there is a valid contemporary justification for resort to a federal court. Whether the net effect of our proposals will be to increase or decrease the total volume of federal litigation is of secondary importance to the major problem of making the division of business between the two systems the most appropriate in the light of the basic principles of federalism. Clearly the totality of our proposals would reduce the number of diversity cases and increase the number of federal question cases in the federal courts. It is important to note, however, that the addition of the maximum possible number of diversity cases to state court dockets would have an insignificant effect on the volume of state court business. The ALI published figures showing that the total number of diversity cases commenced in or removed to the United States District Court for Massachusetts was only about 1 per cent of the number of actions brought in the Massachusetts Superior Court, the state court of general jurisdiction. More recent studies in Minnesota come to the same result. The argument that this bill would ease congestion in federal courts only too increase it in state courts, an eminently proper concern of Congress if true, will simply not stand up in the light of the facts.

MR. FIELD. Mr. Chairman, I did want to take an early opportunity to answer some of the questions that Senator Gurney put yesterday morning to other witnesses.

I think Mr. Wechsler expressly said I could handle one of them better. The basic question that I understand the Senator is concerned with is, in effect, who actually did the work and how much. The

answer is really a very simple one. I had a law student or two who did such things as run down a citation and make sure that it hadn't been overruled or reversed or modified. Similarly, when we finally reached the stage of printing this volume, while I read the proof myself, I had a student check the numbers in the citations because it is so easy in the course of printing to have two figures reversed. Besides that, I had no help at all.

I think the same thing is true of the associate reporters who worked with me. As far as I know, it's entirely true, with a single exception. When we were concerned primarily with the commuter problem, questions were raised by the advisory committee, by the council, as I recall it, or on the floor of the annual meeting about how great a problem this was. Was it big enough to bother with? There is no ready way, statistically, to find the answer to that question. So we employed two students from the University of Pennsylvania to go into the clerk's office in eastern Pennsylvania and run through all of the entries from a given period to a given later period in the docket to see how far they could discover that this plaintiff or that defendant was a commuter. Usually it would not be in the pleadings, obviously, and hence they would go through the file to see if it was disclosed in answers to interrogatories or something that happened later. If it was, they duly recorded it. If they still couldn't find out, they just eliminated it. It's not a perfect guide, but it's the best we could get for the size of the problem. On page 469 of this book, we explain rather precisely how we went about it. [The book referred to here and elsewhere in the testimony is the ALI Study of the Division of Jurisdiction between State and Federal Courts (1969).]

But, apart from that, as the Chairman suggested yesterday, most of the kind of thing we did was individual effort, and not using anyone to do it for us. Of course, we naturally made the broadest inquiries we could, and asked as many people their views as we could find—big city lawyers, small town lawyers, all the people I could dig up to inquire of. But so far as doing the work, it is as I've said.

Does that answer your question?

Senator GURNEY. Yes, it does, Professor Field. Thank you very much.

Mr. FIELD. It is also true, as I think was suggested, that there was not as wide a geographical distribution of the advisory committee as I think would have been desirable. The Institute itself is very widespread in membership, including a good many members from all kinds of communities in all the States. The advisory committee originally was fairly subject, I think, to the criticism that it didn't recognize adequately the West, the Southwest, and so on, and we did something to improve that later on.

I suspect that part of the reason was the financial one so far as Judge Goodrich, the director, was concerned. I was always urging that we have as representative a committee as we could, but the Institute has somewhat limited funds, and I think they failed, possibly, to make it as broadly representative as would have been ideal.

I think I emphasized that all these proposals were hammered out at Institute meetings, which were fairly representative.

Now, Mr. Chairman, I should like to make one more preliminary remark which is in my written statement, but to emphasize that I am here as an individual and that I don't agree myself 100 percent with

everything that came out of this study. Some things were put through by the committee that I was dubious about. Some things were put through by the council that I was uncertain about, and one or two changes suggested on the floor I was uncertain about, as well.

But, not unnaturally, it very substantially represents my individual views as well as those of a majority of the Law Institute.

I should like, Mr. Chairman, to speak about the things which seem to me to be the heart of the bill, the most controversial aspects of it, the parts that have drawn the most fire from opponents. I shall, of course, be glad to try to answer any question that I can on any part of the bill.

First of all, we talked yesterday about the basic principles of federalism. There are lawyers and academics, and distinguished ones, who quarrel with our notion of what those basic principles of federalism are. In a nutshell, our view is that the basic principle of federalism, so far as diversity of citizenship is concerned, is that the diversity provision in today's world ought to bear some relation to the fact that the parties are, in fact, of diverse citizenship, rather than the mere fact that the Constitution is so written that it is, in a sense, or was in a sense, Federal business from the outset to adjudicate suits between citizens of different States.

Historically, the reason that the diversity clause was put into the Constitution—and this, I think, is agreed—was the apprehension of prejudice, actual prejudice or feared prejudice, in a State against the outsider, the man who came from away. This, in the early days of the Republic, was an important unifying influence. In the days before the Republic there was hesitancy about traveling from one colony to another, and the assurance of your court away from home was designed to and did accomplish a substantial unifying influence, encouraged travel, and encouraged undertaking business enterprise away from home because of the greater degree of confidence in the Federal court than was true of the early State courts.

Surely, today, no one worries about traveling from State to State because of the problems of crossing a foreign border, which really existed, I take it, in 1789. That achievement is spectacularly accomplished. Nowadays, we don't even know when we cross a stateline. Sometimes we cross statelines that the airplane doesn't plan to cross when we take off.

There still remains the basic question of what is the proper function in today's world of diversity of citizenship in the Federal courts. We proceeded from the premise that we ought to explore the contemporary justification for it in the light of today's situation, and with regard to the original concept of why it was done. That leads me into what is the heart of the bill, the most important single provision, and the provision that has met the widest opposition. That is the provision that the local plaintiff—the in-State plaintiff, as we call him for convenience—is not entitled to go into the Federal courts of his home State merely because his opponent comes from outside the State. It seems at least anomalous for the man to be able to say, "I can't get a fair trial in my home State, therefore, since I am fortunate enough to have an opponent from elsewhere that gives me access to the Federal court. He can remove if he doesn't like it."

The reason why lawyers like this option—Mr. Marden referred to it yesterday, and I'd like to refer to it again—the reason why lawyers want to be in the Federal court or at least want the option of choosing whether to be in the Federal court really almost never has anything to do with the question of prejudice against their clients, so far as the out-of-State aspect is concerned. It is calendar congestion. It is the hunch as to where you will fare better with a jury. It may be because you like discovery rules in the Federal court better, although most States now are getting rules based on the Federal rules of discovery.

But, in any event, it is an option, and I want it to be crystal clear that nothing I say is the least bit critical of the lawyer taking full advantage of the option and liking it. In the years that I practiced law, I took advantage of it to the utmost, and we all developed a little bit of what we considered our private expert knowledge as to just which State courts you wanted to get out of, and which State courts you wanted to be in. This depended upon delays and upon the composition of the local jury, all kinds of things, but none of them having any relation to the actual question of whether the citizenship was diverse.

Now, so far as the in-state plaintiff is concerned, this represents about half of the diversity cases. The last statistic that I have for 1970 brings it to slightly over half. It has been running during the years of the study, between 45 percent and half, and the trend, is upward.

This is, I think, a proper matter of concern to the administration of Federal justice, particularly taken in the light of the growing amount of Federal litigation, civil and criminal, that we now face. Delays in criminal litigation are intolerable. That's a separate problem with which the American Law Institute study did not concern itself, but there is particularly concern over making an effort in a Federal court to undo what happened in a State court by the use of habeas corpus as a post conviction remedy.

In any event, it is beyond debate, I'm sure, that the Federal courts are too crowded. It is also true that the courts of many—not all—States are also crowded, and the natural argument is made that cases have to be tried somewhere, and you're not really solving anything by putting a case in one court that you are taking out of another. It is true that the case has to be tried somewhere. The fact is, as demonstrated by figures from Massachusetts which I dug out during the time I was working on this study, and figures from Minnesota which have been shown to me by counsel for this committee—and I believe it to be a matter of general applicability—that the volume in State courts of general jurisdiction is so big as compared with the diversity volume in the Federal courts of that State, that the diversity cases are literally a drop in the bucket. They amount to about 1 percent of the entries. In Massachusetts, where the statistics were readily available, I looked to the number of trials as distinguished from the number of entries which is a more realistic look in terms of delay in the courts. I found that the figures as to the actual trials in both systems were fairly proportionate to the number of cases entered. As we all know, after a good deal of haggling and pulling and hauling, the great majority of these cases are settled, so the problem of con-

gestion is not how many cases there are on the dockets, it's how many people there are clamoring for trial who have to wait a long time to get it. Anyway you look at it, it's too long.

Now, if you take the position that the way to handle this problem is to have more and more cases in the Federal courts because the Federal courts are said to be better courts and give you better justice and therefore, the more courts there are, the more judges there are, the more cases there are heard in the better courts, the better off we are.

In the first place, accepting the premise, which is often grossly unfair of the caliber of State judiciary—

Mr. BURDICK. If that is true, the Federal courts are better courts, and doesn't that strike at the very existence of the dual system?

Mr. FIELD. It seems to me, precisely, Mr. Chairman, that if you say since the Federal courts are better courts they ought to have more cases, and the answer is to appoint more Federal judges if they get crowded, then you so undermine State justice that it seems to me scarcely possible that Congress would want thus to undercut State justice. The irony of it is, if you appoint more Federal judges, as we have done at times, what happens is the more Federal judges you have, and the more you speed up Federal justice, this means you attract all the more cases. It's certainly a bottomless pit. And so it doesn't seem to me that that can be the answer.

Mr. GURNEY. On that point, how many cases are we talking about, because I got the impression from yesterday's testimony on this very subject we're discussing now, that the volume of cases affected by this change was very slight. At least that was the testimony of one of the witnesses.

Do you recall what we're talking about in terms of numbers?

Or, put it another way. If we pass this bill as drawn, how many actual cases would we remove from Federal court and put in the State court?

Mr. FIELD. That is a matter upon which one cannot be sure. One can approach it in two different ways. One, how many would be excluded from the Federal courts on original jurisdiction? Then you must consider how often would the defendant who would be able to remove if he wanted to, do so? I did this hastily for 1970. The book has it on pages 466-468 for earlier years, including 1968, but according to my figures for 1970, there would be some 8,152 original actions and 2,104 removed actions kept out of the Federal court, a total of 10,256, or about 45 percent of all of the diversity cases, if every case that was removable was removed. If none of those that were removable were removed, it would be 14,304 on my figures, or some 62 percent of the total.

We can't say how often a case that was removable would be removed. It is, I think—at least I found it so in my practice—a reasonable but not infallible rule of life, that when the plaintiff wanted something the defendant was likely to want the opposite. If the plaintiff would prefer the Federal court, for whatever reasons, good or bad, it is not unlikely that the defendant, for the converse of those reasons, would rather be in the State court. But it is—

Mr. GURNEY. I'd like to ask one other question in connection with that figure, and that is, what proportion of all of the Federal civil

cases—the percentage sounds a great deal, but how much percentage of the total Federal and civil litigation does that comprise?

Mr. FIELD. I'm not sure that I have that figure at hand.

Mr. GURNEY. Could you furnish that?

Mr. MULLEN. I believe, Senator, there were 87,000 civil cases commenced in the Federal courts in 1970.¹ So this figure is—

Mr. FIELD. Of which 19,000 were original diversity actions?

Mr. MULLEN. A total of 22,854 diversity cases—original and removed—were commenced in 1970.

Mr. GURNEY. So we're talking, really, of a much lower percentage within the diversity area itself.

The other question I wanted to ask was this, because this pertains to the Federal court order, and you may not be able to give this answer, but I wish we could have it for the committee's consideration. How many Federal judges would be involved in disposing of these diversity cases that are not transferred to the State court because of this bill?

Mr. FIELD. Well, I—you could figure it out as how much per judge—

Mr. GURNEY. I think you could, and I'm curious to know the figure.

Mr. FIELD. I don't believe that I have that figure. It's a matter of simple arithmetic and I would be happy to get it. Possibly the committee does have it.

Mr. MULLEN. We have not done that on the basis of each particular judge. We have done a study which is in the final stage of preparation of what the effect would be in each State, and you could further break that down.

Mr. GURNEY. If we could have that, I think it might be useful.

(A study of the effect of the bill on State and Federal courts appears in Appendix III.)

Mr. FIELD. It varies greatly from State to State because in some States a particular Federal judge is either peculiarly popular or peculiarly unpopular with a particular kind of litigant. There are all kinds of variables that enter in, so that it would be the rankest sort of speculation to guess about.

Mr. GURNEY. There's another question I have, too. Did you do any studies in Massachusetts? You spoke of the Massachusetts case, that you studied, and also the Minnesota case. How much of a delay would there have been in the case you spoke of in Massachusetts, had that case been taken out of the Federal court and put in the State court? Did you look into that?

Mr. FIELD. I didn't look at it, but I can give you a fairly good idea, I think. Again, you can't look at Massachusetts as such. It is a problem where in some of the rural counties, you may be able to get a trial in the State court as soon or sooner than you wanted it. In my old home county in rural Maine, for example, where the superior court, the trial court of general jurisdiction, came only twice a year for a brief period, you would get a trial almost surely the next time the court came around, so you'd have, say, a maximum of 6 months delay, whereas, in larger places in the State, like Portland, there would be more delay, but still it was not a significant problem in that State.

¹ There were a total of 87,321 civil cases commenced in all Federal district courts in 1970. There were 81,107 cases commenced in the Federal district courts in the States, thus excluding the District of Columbia, Virgin Islands, Canal Zone, and Guam.

I would doubt very much if it is a significant problem in a very large number of States.

I doubt, Senator Burdick, whether there is a serious problem of delay in your State.

Mr. BURDICK. We have very industrious judges all through the State.

Mr. FIELD. On the other hand, and I think in Florida, there are problems in the large metropolitan centers, but I would expect in the rural parts of Florida, as in the rural parts of Maine, that there is not a significant problem.

The point I wish to make is that it's very hard to generalize about a State, and most States do not keep the kind of statistics that would be helpful in getting some of those answers.

Mr. GURNEY. I realize that, and actually, I also understand that isn't really to the merits of this bill, but I thought you had done a study in the Massachusetts case. If you had that information, it might be useful.

Mr. FIELD. I can tell you that in Massachusetts the last time I was aware of the problem in all but say, the relatively urban counties, the State trial would come about as quickly as one wanted it, but in Boston and Springfield and Worcester, or in my home county of Middlesex, which combines a lot of the relatively large cities around Boston, there is much delay. Our State court of general jurisdiction is one where the judges can be moved around as the need arises. This is a little bit like the Dutch boy with his finger in the dike. You find a hole here and you move some judges to fill it, and in counties where normally there isn't much of a problem, the water begins to leak in.

In most States, as in the federal system, the remedy of appointing more judges has been utilized. A bill is pending in my own State of Massachusetts right now for 10 more superior court judges, and there are those who say that's not enough. It is an insistent problem throughout the country.

My sole point here is that we do not contribute to this delay in any significant way by the proposed action with respect to diversity cases. We also do bring into the Federal courts an added number of indeterminate amount under the diversity jurisdiction. By allowing, as Professor Wechsler mentioned yesterday, removal on the basis of a Federal defense, we would take out of the State system some cases—a good many cases, I daresay—which would now have to be tried throughout the State system and only get into the Federal system at all if the Supreme Court elected to hear it on the basis of the Federal defense. As you know, most of the time the Supreme Court elects not to, out of necessity.

A prediction is impossible. We can get some impressive looking figures to show we've done a lot of work about some things we can measure, but when you come to try to decide how many of the things that are immeasurable will be balanced, I don't know. I want to emphasize the fact that the purpose of the study was to have the cases where they really, in our view, ought to be in the light of the best division of power between State and the Federal courts. The reduction of the Federal caseload was an important byproduct, but still a byproduct.

Mr. BURDICK. Professor Field, for the purpose of clarity, I understood you made some kind of a study in Massachusetts bearing on how many cases would be shifted to the State court, and I believe your answer was only about 1 percent?

Mr. FIELD. That's not quite it, Senator.

We drew a comparison between the existing total of actions brought in the State court of general jurisdiction and the total of diversity cases—

Mr. BURDICK. I'm talking about cases tried.

Mr. FIELD. And then we also narrowed it to see how many cases were tried in both systems, and then what is the maximum number of cases that would be shifted if this bill became law. And again we calculated on two bases, if nobody removed when he could and if everybody removed when he could, knowing the truth was somewhere in between. And we come out to an insignificant figure as appears in our book on pages 473-474, and as is still true. It's negligible, a matter of 1 percentage point or so.

Now, returning to the local plaintiff suing the out-of-State defendant, we concluded that so far as basic principles of federalism were concerned, he was scarcely entitled to complain that his home State courts would not give him justice, and that this, in fact, was not the basis on which the options were nowadays exercised. We concluded that there was still a reason for protecting the out-of-stater whom we refer to as the genuine out-of-stater. This may not have been a fortunate choice of words, but it is a description of the kind of person we were talking about.

We concluded that he was as much entitled to a Federal forum on a diversity basis as he ever was. I should like to make the point that in a perfect world you would like to look to see whether in the particular case there was this risk of prejudice. This simply, realistically cannot be done. You have to do it by categories of cases. Otherwise you would have a vast amount of threshold litigation determining where you ought to be, which is undesirable, and you would put the Federal judge in a position of making frequent decisions as to whether a particular party could get a fair trial in the State court. This is a difficult, almost impossible task, and one which I am certain Federal judges would shy away from like the plague. Of course, there is the factor of the local judge, and there is also the factor of the local jury, and this depends, to quite a degree, upon how wide an area each district or each county or whatever it may be that is the unit for State court trials covers—how big it is.

I understand in your home State, Senator, that you don't have very many districts, and that each district is big enough so that you don't run into the small town where the jurors know everybody and are likely to favor the local man as against the man from away, whether he's from a nearby State or simply across the next row of hills. And I am certain from experiences of my own that the parochialism, if you want to call it that, of the local juror, the tendency to favor the local man against anybody from away, is a problem seen all over the country. I have referred to my own experience in debating with my friend, John Frank, before the Law Institute, and in several other forums. We have done it so many times that each of us knows pretty well what the other has in mind. We have compared it to a fixed

wrestling match because there's no secrecy about our positions and the differences in them.

I like to talk about Cape Cod, Mass., where I, unfortunately for my clients, have had some cases, and on Cape Cod, if you come from the other side of the canal, you are as much a foreigner as if you came from California, and you're never allowed to forget it. Here the superior court judges circulate all over the State, but it's a local jury, and you have a feeling that you are up against it when you are trying a case in a small town, as they all are on Cape Cod. Your opponent is careful to never let the jury forget that here's the foreigner from Boston who's trying the case. Even if your client has some type of business establishment on the cape, emphasis is on the fact that after all, it's a Boston outfit. I would remove it to the Federal court if my client came from Providence, R.I., which is nearer the cape geographically, but under the Constitution a Boston defendant simply cannot get into the Federal court from Cape Cod. Therefore, our view in dealing with the out-of-stater and the question of prejudice was that as a general matter, drawing the general rough line that we had to draw, there was a much greater assurance of freedom from prejudice if the out-of-stater were still allowed access to the Federal courts, and that's the premise upon which we proceeded.

There are all kinds of prejudice, unfortunately, in our national life, geographical, racial, religious, prejudice against the rich or against the poor, all sorts of things, and under the Constitution we cannot through diversity jurisdiction or in any other way solve, through our judicial system, all of these problems. The point of our study, and the point, Mr. Chairman, of this bill, is that you do get a good many of the cases of actual or potential prejudice out of the State system, and we can do no more, and the focus of the bill, really, as I said, is on the in-state plaintiff.

I would like to have you, if I may, Mr. Chairman, consider the choices that were open to when this study was commissioned. We might—and there were a good many people who urged it—have concluded that diversity jurisdiction should be abolished. There was at that time no one on the Advisory Committee who took that position. We had a long session on this among other alternatives. Judge Friendly, as Professor Wechsler said yesterday, I believe, has since come to the position that the diversity jurisdiction just has to be abolished, which I still don't agree with, and at one time Professor Wechsler, himself immediately after World War II, had taken the position that it ought to be abolished.

Mr. GURNEY. What was Judge Friendly's reason?

Mr. FIELD. I am not certain. When we had our discussions that culminated in this bill, he was in accord with me with almost all the provisions of it. There were one or two places where he would have liked to take more away. All I know is that I've been told that he thinks now we didn't go nearly far enough, and probably should go all the way. I assume it is that in his new responsibilities as chief judge of the court, he looks at what's before him and throws up his hands at what's to be done. I don't know. I hope, as Professor Wechsler did, that he will be here to talk about it.

Incidentally, the most vociferous of our opponents would be far more unhappy about that result than about the result that we propose.

There was also, of course, the possibility of retaining the status quo. If that is the right answer, we've wasted a great deal of time trying to find a better way to do it, but apart from the question of wasting time, it seems to me that the status quo was rather plainly unsatisfactory. The extreme position the other way is to open up diversity jurisdiction to every case that the Constitution will let you because they are better courts, and the more cases there, the better. Most of the people whom I have heard in opposition to the bill don't carry it to that logical conclusion.

For example, as you know, Senator, now the local defendant can't remove to the Federal court whereas the local plaintiff can bring a case there originally. It seems to me that that's been wrong ever since 1789, and there are two ways to rectify it. One is to let the in-State defendants in and the other is to keep the in-State plaintiffs out. Between the two, for the reasons which we went into in some detail, keeping the in-State plaintiffs out seems the better.

Mr. GURNEY. Why, if that seems so patently wrong, do you suppose they arrived at that at the beginning?

Mr. FIELD. Most of my teaching life, as distinguished from my professional life, I've spent in wondering how it got to be so. It seems to me that it was an anomaly from the beginning and it is no less so with the passing of the years. There may be deeper students of the history of its origin who can give you a better answer than I, but to me it never made sense.

Still another option that we had was to treat categories of cases and just exclude them irrespective of any other consideration. Dean Meador of Alabama, now I understand, back at the University of Virginia Law School, some years ago advocated taking all of the motor vehicle cases out of the Federal courts as being the kind of case where prejudice or apprehension of prejudice wasn't very likely. I would very much deplore that rough cut solution, although it would keep a lot of cases away from the Federal court. It doesn't seem to me that motor vehicle cases are all that different from other kinds of cases. This would not be a principled, rational decision, but simply a way to get cases out of the court, which would not be a very desirable approach. And incidentally, most of the most concerned opponents of this bill would be hit harder by that than by other possible kinds of alternative proposals. We've come out somewhere in the middle, not as a matter of calculated compromise to make what we have done look palatable, but by applying the best we could what seemed to us the wisest principle. We did come out in between somewhere, and thus, as one who winds up in the middle traditionally does, we draw some fire from people who wish we had done a lot more and from people who wish we had done a lot less.

Now, in the absence of questions about the in-State plaintiff, which I would be happy to answer if there are any, I would like to turn to the other side of the coin. This is the section of the bill dealing with the foreign corporation and its local establishment, which not unsurprisingly the corporations affected are not very happy about but which we think is a fair approach. This is section 1302(b) of the bill.

As you know, under existing law a foreign corporation can invoke Federal jurisdiction originally or on removal in any diversity case so long as, since 1958, its principal place of business was not in the State.

There are many, many, Delaware corporations with their principal places of business all over the country, which are now treated as citizens of both Delaware and the State where their principal place of business is. This has led to some litigation as to what is, in fact, the principal place of business of United States Steel and American Airlines and several other corporations involved in different States but they are being, and fairly well, I think, ironed out.

We took the position that a foreign corporation which was really heavily involved in local enterprise should be no different from the local corporation. This was mentioned by Professor Wechsler yesterday when he spoke of some place on Cape Cod where he said that local customers didn't know whether the two markets that he named were incorporated locally or not. As a Massachusetts man, I happen to know that one of the two is a Massachusetts corporation, and the other is not.

The important thing, I think, really is not how much the customers know, but how much a juror would be likely to know. Whether we look at it from the point of view of the customer or the juror, I simply don't believe any distinction is made in the minds of either as to the difference between the market they go to every day that's incorporated outside the State and one that's incorporated inside the State. They don't know and they don't care. They regard it as local, and we came very readily to the conclusion that such a local establishment was not the kind of stranger who should be given the benefit of a Federal court.

Having decided that that was the principle, and the advisory committee, as I recall it, was unanimous on that, we came to the sticky problem of definition.

Now, we don't like threshold litigation as to whether a case is in the right court or not. It's a rather wasteful business. Having decided upon the principle, we had basically two choices: one was to use rather generalized language and leave it to the courts. This would look simple but would be in practice difficult, as simple general language left to courts almost invariably is. The other was to try to give a very specific definition to minimize the uncertainty.

We knew well—and this happened—that when you draw very precise lines in a definition, some of them are going to appear to be rather arbitrary. Every time there is a line, there are things that are close to it each way, and it's difficult to say the line should be here instead of over there a little bit. We thought that on the whole it was better to try to be specific at the risk of seeming a little bit arbitrary rather than to put the whole thing under the rug and say the courts can solve this from time to time as the matters arise.

The focal point or the thread that ran through our thinking was whether there was visible competition with local enterprise. The market illustration that I gave a few moments ago is an example of it. There are numerous other possible examples.

We drew the line, for example, between being in the State to sell and being in the State to buy, on the theory that if you are in the State to sell, you are dealing with a broad public in competition with local business: but if you are in the State to buy you deal with a limited number of suppliers whom you came there to deal with. You're not holding yourself out to the general public in competition with the local folk.

I think most of the specifics in the definition will be found to bear out this general approach that there is visible competition with local people. It is true, and this is referred to in my prepared statement, that we include a manufacturer who is not in such visible competition except for the labor market. But when a corporation makes a calculated choice for many reasons, access to local supply, local labor, and the like to move to or establish a factory in a particular State, he does take into account many of the State's laws—workmen's compensation laws, all kinds of things. It seems to us that when that kind of a decision is made, and he is firmly established very often in a rather big way, he cannot say in fairness that when it comes to access to Federal courts, "I'm still a foreigner, let me go back into the Federal courts." This is, as I say, the focus of the local establishment rule.

I'm not at all sure that the definition of what a local establishment is could not be made more clear-cut, more precise, or better. It is the result of batting it around in the committee, on the council, on the floor of the institute for 2 or 3 years, and that's the best that we could come up with and still achieve the objective of having the guidelines clear enough so that the poor lawyer, wanting to know what he could do, would not have too much guessing as to how a court would come out.

Senator GURNEY. Now, if we take an example there—let's take an example, say, of a Du Pont company, which is a large company. Let's assume we have a synthetic fiber plant in the State of Florida.

In that case, as I understand your explanation of the bill, the Du Pont company would not be allowed to remove a case to a Federal court if it were brought against it, is that right?

Mr. FIELD. Not if it arose out of the activities of the Florida establishment, and I think that's a good illustration that there may be prejudice in Florida or almost any other state against the Du Pont company, because it's a very large corporation, and it ought to be able to afford to pay.

Senator GURNEY. This is the very point I was making in trying to dramatize the example, and isn't this exactly what the diversity section in the Federal Court Jurisdiction Act is all about?

Mr. FIELD. In a sense that is true, Senator, but it seems to me that the prejudice—the hypothetical prejudice—against the Du Pont company is not because it's an out-of-stater, but because it is a big corporation, and the same prejudice precisely would exist if it were incorporated in Florida.

Senator GURNEY. Well, I would say it was a combination of both, big and way up there in the north, so let's sock it to them, boys—it seems to me that that's what it's all about; and I grant you your arguments are true, when a business comes in from outside, it does subject itself to a lot of local laws, but I don't see what bearing that has upon the diversity argument.

Mr. FIELD. It seems to me, Senator, that if the Du Pont company is sufficiently attracted to Florida because of any number of Florida conditions which you and I, I'm sure, will agree will make it a desirable place to do this kind of business, if they make the major decision that they want to be in Florida, they know they're subjected to many Florida laws. They may say this is all right, they've taken it into account. They know that they cost Florida quite a bit of money to

provide various State services. To be sure, they pay taxes, but they are in Florida for a lot of important reasons, and it does not seem to me that to claim not to be in Florida for the purpose of right of access to the courts, is really then right. I don't agree that that is what diversity is all about.

Senator GURNEY. But by that same reasoning, that would cover about any diversity case. I might say that if you don't want to subject yourself to the State courts, don't come to Florida, don't come to Massachusetts, don't come to North Dakota. It's the same reasoning.

Mr. FIELD. I think not quite the same reasoning.

I doubt whether the Senator has ever heard of an ordinary traveler who said, when he approached the Florida line or contemplated going there, said, "Well, now, this is like crossing into a strange country. I guess I'd better stay at home, because Florida carries with it risks that I don't want to undergo."

Senator GURNEY. But I would say in answer to that, but I don't think that the Du Pont Co., or any other big company in America, would stay out of Florida simply because they couldn't get into a Federal court.

Mr. FIELD. I am not urging that they should stay out of Florida. I'm saying they should come to Florida, for all the reasons that you have so well put, but that, having come to Florida, they should be in the Florida State courts like the locally incorporated factory.

Senator GURNEY. I'm simply saying that I don't think your reasoning holds up, that you're not going in or out of a State simply because of Federal jurisdiction, but I say that's part of the Federal court system, and I don't see any reason for denying it.

Mr. FIELD. The State of Florida could, Senator, say if you come into Florida to build your factory, you must incorporate locally, and there are such State requirements, often with respect to railroads, which are required to incorporate multiply. Florida hasn't done it. If Florida did do it, I doubt if it would make one iota of difference as to whether Du Pont or anybody else came there, again for the reasons you have persuasively put.

But it's simply a question of what, under all the circumstances, is the fair thing in light of the principles of what diversity is all about, and this is where seemingly—

Senator BURDICK. After hearing this colloquy, I'd like to suggest another example with the Du Pont Corp. in Florida. Let us suppose that customer A in Florida defaults on a bill, and a suit is filed by Du Pont Co., in Delaware, that case would be transferred back to Florida, because "A" would be a citizen of Florida.

Mr. FIELD. The chances are that that suit could not be brought in Delaware, because the Florida citizen would be unlikely to be reachable by process in Delaware.

Senator BURDICK. Assuming he could be served.

Mr. FIELD. I think that's a big assumption. If he could be sued, if he happened to come and visit his daughter in Wilmington, and the Du Pont Co. found out about it and served him, he could (1) remove to the Federal court, and (2) in all probability upon showing that the events all occurred in Florida and that Florida was the proper place for trials, get a transfer under the present title 28, section 1404(a) that allows transfer for the conveniences of parties in the interests of justice.

Senator BURDICK. How about the long-arm statute of Delaware?

Mr. FIELD. The long-arm statute of Delaware does not, and I don't believe constitutionally could, bring into Delaware a case arising in Florida involving a Florida defendant.

Senator BURDICK. Suppose there is an auto accident in Delaware.

Mr. FIELD. If it's an auto accident in Delaware, it is true that under the Delaware long-arm statute—I think now every State has one with respect to motor vehicles—he would be answerable in the local State court. He could remove—

Senator BURDICK. That's my point.

Mr. FIELD (continuing). Then he could try, almost certainly unsuccessfully, to get it transferred back to Florida. There have been a handful of cases where the only significant issue was that of damages, and all of the doctors were in the State where the—

Senator BURDICK. So the case would most likely stay in Delaware.

Senator GURNEY. The thing I'm concerned about is that following this reasoning and in cases like this *Du Pont* case, it seems to me that Judge Friendly, if he still has the same opinion, is right. What's the point of the diversity at all? Let's throw the whole thing out.

And I really think here that we're sort of making a compromise: well, let's keep it, it's a long-honored tradition, we shouldn't get rid of it. At the same time, let's throw a few of these things out.

Mr. FIELD. Well, needless for me to say, one of the reasons this committee is considering this bill, is not whether to vote it up or down but whether to alter it; and it would be presumptuous for me to say it's so perfect you shouldn't lay a hand on it anywhere, although I happen to think we drew this line in a wiser place than if we had drawn it somewhere else.

Surely, as I said, this is why Congress sets up committees to have hearings on bills. There's no such philosophy as "here it is, take it or leave it."

Senator BURDICK. One more question, while we're on this subject, of the definition that appears on page 7 under 1302(b)(2), local establishment.

You said that the thread running through your distinctions was that when a party sold and didn't buy—now, referring to North Dakota, I'd say we have some very large businesses that buy—I'm referring to large grain concerns that do multimillion-dollar businesses. They buy from many, many farmers. Should we exclude them from the coverage of 1302(b)(2)?

Mr. FIELD. They would be excluded from coverage under this bill.

Senator BURDICK. Now, it's true that many of these people sell grain and certainly I could conceive of a situation where they just buy and still are a million-dollar outfit.

Mr. FIELD. I think that you're right, Mr. Chairman, that under the definition of the bill the line between buying and selling might include as in the illustration that you give someone who buys on such a widespread basis from individual farmers all over the State of North Dakota that it is an arbitrary line to say he is different from someone who sells all over North Dakota.

Senator BURDICK. And we have commission firms buying livestock, millions and millions of dollars. All they do is buy it. They certainly do business in the State.

Mr. FIELD. Sure, they are doing business in the State.

Senator BURDICK. And the farmer who goes——

Mr. FIELD. When you say a commission firm——

Senator BURDICK. That's the name we call them, just an outside corporation that comes in and sets up an office in stockyards and has a buying point.

Mr. FIELD. But buying for itself and not as an agent or broker for other people.

Senator BURDICK. Yes; both.

Mr. FIELD. They would fall outside this definition of local establishment, and if they shouldn't, then the definition is not wise in that respect. I think both of the illustrations we've given, Mr. Chairman, are illustrative of cases where the activity in the State is so comprehensive that they cannot reasonably be distinguished from a local enterprise.

I suspect that all those farmers who deal with them know that they come from outside, whereas the customer in the retail market probably doesn't. How important that is, I'm not prepared to say.

Senator BURDICK. Sometimes they do and sometimes they don't. We have many local elevators in North Dakota too, locally owned, and you might tell, maybe from the name that's inscribed on the elevators, but that isn't a true test either. We've got a lot of local elevators which are really owned out of State, but it's hard for me to see a distinction between doing a million dollars of business in buying distinguished from a million dollars of business in selling.

Mr. FIELD. I think the distinction is not how many millions of dollars worth of buying they do so much as it is what seems to be true with reference to the kind of outfit you are referring to, whether they are dealing on such a widespread basis with so many, many people that they are, for all intents and purposes, dealing within public array the way selling corporations are. It's entirely possible that the committee will think that that line is not properly drawn.

I'm glad you brought that case up, because it does illustrate that wherever you draw the line, there are hard cases, and I would be the last to say we've drawn it perfectly. We certainly did the best we could, and I trust I will be pardoned for saying we didn't think of this specific problem, the problem of that kind of widespread buying. We might have found a way to write the definition in statutory language to cover it.

Senator BURDICK. Maybe that was because you didn't have a country lawyer in on the panel from North Dakota.

Mr. FIELD. I wish we had had a country lawyer from North Dakota on the panel if only for the sake of the last few minutes.

Senator GURNEY. Let me ask one other question Professor Field because I've seen this crop up once or twice before in the colloquy we've just had, that is whether the farmer dealing with the Commission people, as the chairman calls them, knew whether they were in a out-of-State or a local corporation, and Professor Wechsler mentioned that yesterday in connection with two stores on the cape. But what's that got to do with this problem, whether the customer knows whether the business is foreign or not. I don't see what that has to do with the right to use the Federal court.

Mr. FIELD. Speaking as I have today, both of the customer and of the jurors, if neither the customer nor the juror knows that he is dealing with a foreign corporation and doesn't care, it does seem

unwise to say, "Well, that corporation, even though it is regarded by all the people and all the jurors just as though it were local should be able to rely upon the unknown fact that he's incorporated in a different State."

Senator GURNEY. My answer to that would be when he gets into court, as far as the law is concerned, the judge and the jurors pretty well know that he is not a local corporation but a foreign corporation, and that's what the whole business of diversity is all about, not the fact that the customer didn't know.

Mr. FIELD. They pretty well know, because in the pleadings in the case they are described as a corporation of Delaware, or wherever it may be. I expect that it would be regarded as improper argument to advert to in arguing to a jury.

Senator GURNEY. All I can say to that is I've never seen a lawyer who didn't make the jury aware of what he wanted to make them aware of, if he is any kind of a lawyer at all.

Mr. FIELD. I'm sure that I have been guilty of that.

Senator GURNEY. We all have.

Mr. FIELD. I have sometimes found it proper to warn the jury not to take something into account because they shouldn't when all I really wanted to do was to be sure they knew about it.

Senator GURNEY. I think we've belabored the point enough, but I just wanted to know what customers knowing whether a business is foreign or local has to do with this.

Mr. FIELD. Because you are speaking from a premise which may or may not be true, I just don't know, that if the juror had it made known to him one way or another that this was a foreign corporation, it would make any difference to the juror whether the corporation came from Delaware, from Providence, R.I. or from Boston, Mass., which was my occasional misfortune to be involved with on Cape Cod. It's not because it's a corporation from away, mostly, I think, but because it's a corporation, that leads a type of juror to say, well, corporations have a lot of money and plaintiffs don't and let's help the plaintiff at the expense of the corporation.

That's as widespread as the administration of justice. There is a tendency of jurors to prefer the little fellow to the big fellow, and this is particularly manifest when the big fellow is an insurance company and the juror is likely to react, "Well, they got the premiums; this is what they're in business for, let's give it to them."

Senator BURDICK. Professor Field, my attention was called to the fact that we're really dealing with the subject that you've been talking to the Senator about, that we're really dealing with an extension of a change passed in 1958 about the diversity of corporations. The rule was that they were citizens of the place of incorporation, and then in 1958 the law was changed so that they were deemed citizens of their principal place of business. Now we're extending that to where they have a local establishment. So the bill just extends the 1958 changes.

Mr. FIELD. Yes. In 1958 the problem the Congress was confronted with and resolved was to hit the people from Florida, from Massachusetts, from wherever, who thought they'd like to incorporate in Delaware. I've had clients come in to me and say, "We want to incorporate, and we think we'd like to incorporate in Delaware," and their business was solely in Massachusetts. In fact, the one I have in mind was a local laundry company.

And I said, "Why on earth do you want to incorporate in Delaware?" Well, that's the way people do. It's the fashionable thing to do, just as Nevada once had a very near monopoly on divorce business from all over the place, which other States have now reduced somewhat, Florida I think being one.

In our analysis, this man had no reason whatever for incorporating other than in Massachusetts. Often the reason for wanting to incorporate in Delaware, or some other such State, is because the corporation laws of the State of Delaware give the maximum control to management as distinguished from shareholders. Since it's management that does the incorporating, they find more hospitable the laws of a State that is generous about what management can do. I think it was a very wise first step on the part of Congress to say, Well, where this is essentially a business in Massachusetts, Florida, North Dakota, wherever it may be, we should not treat them as Delaware citizens for diversity purposes. Their principal place of business is a useful criterion.

We are carrying forward in these proposals an idea that came first in the statute books as a result of the act of Congress in 1958.

If I may go on to the next proposal—

Senator BURDICK. Let's take the two that you've discussed already, diversity and the question of local establishment.

You said in your opening statement that you had some reservations about some of the findings of ALI. Have you had any reservations, or do you have them now, on these first two subjects that you've discussed?

Mr. FIELD. I have no reservations whatever about the in-State plaintiff. I have no reservations whatever about the principle of the local establishment. I am simply saying we did the best we could to draw the line. We think the line should be drawn specifically rather than leaving it to the poor lawyer to have to guess at his client's peril.

I should, in that connection, say that section 1386, the final section I wanted to talk about deals with a requirement of prompt raising and foreclosure of jurisdictional issues that is, I think, helpful under existing law and more so under this bill. All too often the jurisdictional objection is not made until very late in the game when things are going badly, and then the party who is unhappy about the way things have gone or are going says, But there's no jurisdiction of the subject matter. This is not a diversity case. And there are some horrible examples of wasted litigation because it was and is possible to raise this defect at such a late point in the litigation. Our section, so far as I know, has met with universal approval once the question of its constitutionality was resolved, which we did by a memorandum that apparently satisfied the institute. To be on the safe side, however, we added subsection (2)(1)(5) to section 1386, so as not to foreclose consideration of jurisdictional defect when the Constitution so requires. Nobody seems to favor the bringing of jurisdictional objections late in the game after the winds seem to be blowing the wrong way.

But, to return to the question of the definition, I have no reservations about the principle. I am certainly not sufficiently arrogant to say that I or the committee or the council or the Institute achieved perfection in details. I am prepared to say that any definition that tries to draw lines closely is susceptible of improvement as well as susceptible of being worsened.

Senator BURDICK. You stand firmly on the principle?

Mr. FIELD. I think the principle is right, yes.

The next issue is that of the commuter, whom we have said we think is a category of out-of-staters to whom the basic principles of federalism which we have applied should exclude from the Federal courts.

This is primarily a matter of a handful of very large metropolitan centers—New York, Philadelphia, Chicago, come to mind—but it is not exclusively so. I was speaking to Senator Gurney before the hearing started about the extent to which there was commuting to Pensacola from across the State line, or to Tallahassee, and he thought there would be little to Tallahassee and he wasn't sure but he didn't think there was very much to Pensacola, because Florida was obviously a better State in which to live. The definition would however, equally cover the man from out of State who was one of a small number who commuted to a smallish place rather than to one of the handful of giant metropolitan areas that extend beyond State lines.

Senator BURDICK. Professor Field, I want you to know that astride each side of the Red River of the North, one of the few rivers that flow north in this Nation, has on one side a city known as Fargo, N. Dak., and the other side Moorhead, Minn., and it's almost one community.

Mr. FIELD. I am very aware of that geography, and the same is true in Texarkana of Texas and Arkansas, in Kansas City, Mo. and Kansas City, Kans., and a good deal of outlying country. It is not peculiar by any means to three or four metropolitan centers; it's much more prominent in those States. Those happen to be the States where the Federal system is most congested.

If Senator Hruska were here this morning, I would probably have mentioned Omaha and Council Bluffs as falling into the same category which would be covered. Our theory on the commuter proposal is that the man who spends all his working hours in the State and goes home at night across the State line is not the kind of out-of-stater whom we are really talking about.

The history of the commuter proposal within the institute might interest you, Mr. Chairman. It started out as an idea of the reporters. The initial reaction of the advisory committee was not particularly favorable. We talked about it at two meetings and finally the advisory committee came to the conclusion that probably it was right after all, although not all of the advisory committee agreed. As I recall it, Judge Lord remained opposed to it throughout. He is a Philadelphia judge who is aware of the Camden and Philadelphia problem.

Similarly, the council said this may be conceptually right but is it worth all the bother? It can't be all this important.

This is what led to this docket study in eastern Pennsylvania that I mentioned in response to Senator Gurney at the beginning of the morning. We did conclude from that study that it was a very significant factor in eastern Pennsylvania. And, as I say, finally the council became persuaded it was right. It was criticized on the floor and put over for further consideration to another annual meeting, and eventually accepted as right by a fairly substantial majority.

The people who don't like it are not unnaturally the Philadelphia lawyers, for instance, who are happy to be in the Federal court when

they have a plaintiff from Camden, N.J., which is for all intents and purposes—

Senator BURDICK. What makes them so special, Philadelphia lawyers? We hear about them a lot.

Mr. FIELD. The phrase originated in a wholly different connection, and I used to know what it came from and probably the Senator does now. At the moment I only know that it's a derogatory expression, though I did not intend it in any derogatory sense.

The one reason we were particularly interested in the eastern region of Pennsylvania in this respect is because it was in Pennsylvania that the chief use was made of the appointment of an out-of-State fiduciary, an out-of-State administrator as an out-of-State guardian, to represent a Pennsylvanian, and traditionally the diversity of citizenship has depended upon the citizenship of the fiduciary rather than that of the decedent or the ward, or whatever it might be.

And this was widely used in both the eastern and western districts of Pennsylvania.

Senator BURDICK. Just for the purposes of getting diversity.

Mr. FIELD. For the purpose of securing diversity, manufacturing diversity.

It seemed to me at the time we had our first public hearing that this was a happy provision to start with. We came to it early because it's in the first section and I, in my innocence, thought that this would be something that nobody would object to, this artificial creation of diversity of citizenship. Well, I found that a very large number of lawyers, from Pennsylvania particularly, objected violently to it. The court, in fact, in one case which upheld diversity in a footnote made the point that on the docket of that court were 35 cases with the same person as administrator for Pennsylvania decedents. Quite plainly this was someone in the law office of the plaintiff's attorney who was appointed for the purpose of getting diversity. He was, incidentally, a commuter, but he was knocked out by this proposal. After extensive debate, it was decided—and I think most of the critics now agree that it was right—that the manufacture of diversity in this fashion was an undesirable thing and that one should, as our bill does, look to the citizenship of the decedent or the ward or whoever it may be rather than the out-of-State citizenship of the fiduciary.

Incidentally, as pointed out in my original statement to the committee, this is a device that can be and has been used, both to create and defeat diversity of citizenship. A lawyer from South Carolina brought to my attention the fact that it was not uncommon, when one wanted to remain in the State court, to appoint a fiduciary who was a citizen of the same foreign State as the prospective adversary and keep the case in the State court. This seemed equally an abuse to me, and our proposal would knock it out, either when you are trying to get or trying to forestall Federal jurisdiction.

Senator GURNEY. May I ask one question on this?

In your bill, Professor Field, on page 8, subsection 3, what does that mean? What's that in there for?

This section 1302—no, that's (b)(3).

Mr. FIELD. This was suggested to us from, as I recall it, on the floor, and the suggestion was made that if you were talking about competition with local enterprise, you must be talking about business in the sense of pursuit of profit.

We accepted the proposal, and it, I think, makes a kind of rough sense.

One of the problems that we were confronted with, as a matter of definition, was the variegated forms that, for example, a labor union may take with its locals and its various divisions. This was one very minor factor, but the chief reason was that our basic thesis of competition with State enterprise reasonably implied profit seeking, a profit-seeking enterprise. I don't think it's terribly important. It's right as far as it goes, but it's not an idea that emanated from either the reporters or the advisory committee, but one which we have accepted, because it seemed to meet to the general acquiescence of the membership.

Senator GURNEY. Where did you say the idea came from?

Mr. FIELD. It was presented first on the floor of the institute from the membership.

Senator GURNEY. Do you remember who?

Mr. FIELD. I don't recall who. I'm sure I could find out if the Senator is interested.

Senator GURNEY. I am interested.

Mr. FIELD. It was presented either from the floor or by a letter to us from a member. In either event, I should be able to find out and I will endeavor so to do.

Senator GURNEY. I honestly don't see why whoever discovered this—and I'm really not sure myself—but you mentioned that possibly labor organizations should receive treatment different from business organizations. I suppose foundations would be included in this too, if they're involved in a lawsuit, or let's say the Ford Foundation.

Mr. FIELD. I suppose that's true.

Senator GURNEY. And I don't see the point at all.

Senator BURDICK. I've been trying to think of reasons too, and maybe it excludes things like religious organizations, nonprofit organizations, and things like that.

Mr. FIELD. It's a matter (1), which I would be happy to find the source of and (2) I would be glad to amplify the reasoning for it a bit more. It not having come originally from the advisory committee, I'm afraid that I'm not making an adequate case for it, and I think you should have before you whatever the reasoning was that induced us to do it.

Senator GURNEY. We'd appreciate that.

(The letter to Senator Gurney in regard to the question follows:)

SEPTEMBER 30, 1971.

HON. EDWARD J. GURNEY,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR GURNEY: In the course of the hearing on S. 1876 Tuesday you inquired about the origin of § 1302(b)(3) of the bill. My answer from memory was that I thought it resulted from a suggestion made on the floor at an Annual Meeting of the Institute.

I have now looked back to try to pinpoint the origin of this provision more precisely. It was not in Tentative Draft No. 2 as presented at the 1964 Annual Meeting. There was extensive debate at that meeting about the definition of "local establishment." Numerous proposals were made in a discussion extending from page 89 to 136 of the American Law Institute Proceedings for that year. There were several changes voted and an undertaking by the Reporters to re-examine the language in the light of the discussion at the meeting. In that re-examination we realize that throughout the discussion there had been frequent

references to "business activities." For example, Fairfax Leary, Jr. of Pennsylvania proposed the expansion of the subsection to include partnerships and sole traders "engaged in business activities" (p. 130); Gregory Hankin of Washington proposed the language "or any form of business enterprise" (p. 133). There was some discussion of the right of removal by a labor union and the right of the removal by the NAACP in a suit for damages in tort. Finally, Judge Friendly said (at p. 135): "I don't see that the NAACP fits into any of these definitions. We are talking about business organizations here. There isn't any thought that I have heard of that we were going to depart from the definitions of the second paragraph of (b). It seems fairly doubtful even that the labor unions would come in, but these other organizations—I don't see the relevance of all this to the problem we are discussing."

When the Reporters came to the task of redrafting to meet the sense of the meeting, it seemed to us that the best way to do so was to insert what is now subsection (b)(3). I explained this change to the Advisory Committee in a redraft submitted for a discussion at a meeting on February 15, 1965, in the following language:

The third paragraph of this subsection is new. The purpose of the subsection is to deprive a business organization of the stranger's right to a federal forum when it "has for a substantial period maintained a place of business visibly competing with local enterprises," so that "it is not likely to be regarded by its customers in any different light than it would be" if its principal place of business were local. T.D. No. 2, pp. 69-70. The Reporters agree with the suggestions made from the floor at the 1964 Annual Meeting that these considerations do not apply with similar force to charitable, religious, or educational institutions, to labor unions and fraternal societies or to other non-profit organizations that do not ordinarily compete with local organizations and thus do not acquire a local personality in the same sense. Moreover, these non-profit organizations present such a myriad of structural arrangements—chapters, branches, posts, lodges, locals, etc.—with such varying degrees of autonomy that their inclusion might well prove a fertile source of litigation. For these reasons, the Reporters recommend the exclusion of such organizations from the scope of the subsection. The language of the exclusion is designed to make it clear that the entity must surmount three hurdles in order to qualify. (1) It must not be *organized* primarily for the purpose of conducting a trade or business for profit. Thus an entity organized for profit, even though wholly owned by a non-profit organization, would not qualify. (2) It must not be *operated* primarily for the purpose of conducting a trade or business for profit. Thus a buying or selling or other cooperative not organized for profit but serving the financial interests of its members or shareholders by conducting a trade or business would not qualify. (3) It must not be primarily engaged in insuring its members or shareholders with respect to the happening of any event. Thus a mutual insurance company or similar entity would not qualify, whether or not it was regarded as conducting a trade or business for profit.

The Advisory Committee approved the suggestion, as did the ALI Council, and it was presented in the present form to the 1965 Annual Meeting. See Proposed Final Draft No. 1, pp. 73-74. I called the attention of the meeting to this addition and asked if there was any discussion of it. There was none. See ALI 1965 Proceedings, p. 53.

So far as my records and memory serve, it was the Reporters, and the Reporters alone, who put this change into words, but we did so as the best way in our judgment to reflect the wishes of the membership at the 1964 meeting. The fact that it was accepted without challenge indicated that we succeeded in doing so.

I hope that this satisfactorily answers your inquiry. If I can be of further help, on this or any other point, I should be glad to do so.

Sincerely yours,

RICHARD H. FIELD.

Mr. FIELD. The basic reason, I'm quite sure, was the notion of competitive business which we have already harped upon so much.

I think I should mention before I leave the matter, that the question of the manufactured diversity which we have just been talking about

has, to quite an extent, been resolved in the courts since our study was published. The Third Circuit, where, as I've indicated, most of the trouble lay, held that in *McSparran v. Weist*, which was referred to in my written statements that the appointment of the fiduciary for the purpose of creating diversity was improper and collusive under the existing law. This was an overruling of earlier decisions in that circuit to the contrary.

I think our definition, our approach, is still somewhat better for two reasons. One, we've hit both the artificial creation and the artificial prevention of diversity. The other is that whereas the decisions so far in the Third Circuit would appear to require a factual inquiry in each case as to the motivation in the appointment, we simply say that such inquiry should be avoided, and you should have a rule that you look to the citizenship of the decedent or ward.

Senator BURDICK. You're saying then in a case where there's a bona fide appointment of a fiduciary or say, an executor or an administrator or something, a close member of the family where there is no intent to circumvent the rules, in a case like that, they wouldn't permit diversity?

Mr. FIELD. No.

Let me make this clear. If the local statute says that the suit shall be brought by the widow, who would normally have the same citizenship as the deceased, or by children, who might well not, if they would get into the Federal court on a diversity basis by reason of the fact that they live outside the State and they have been designated by the State statute in bringing the action, they could come into the Federal court.

But if it were, for instance, a son named as executor who lived outside the State but where there was statute that the suit was to be brought by the fiduciary for the benefit of the widow and children, that would be hit by this proposal.

Senator BURDICK. You think it's fair to clarify it across the board, that diversity be determined by the citizenship of the ward or the decedent?

Mr. FIELD. That's correct.

If, as I say, it is the citizenship of the fiduciary that controls—if you look at the language of the section, you will see that it does not apply to the person who by reason of relationship is the party entitled to bring a lawsuit.

Senator BURDICK. Where is that found?

Mr. FIELD. Section 1301 (b)(4). "An executor or an administrator, or any person representing the estate of a decedent or appointed pursuant to statute with authority to bring an action because of the death of the decedent shall be deemed to be a citizen only of the same State as the decedent." This is where he is appointed, pursuant to statutory authority to bring the action, and not entitled to bring it by reason of his relationship irrespective of being appointed.

In other words, it is where, in the ordinary situation——

Senator BURDICK. Then there's no choice?

Mr. FIELD. That's right.

I would like, if I may at this point, to refer to some of the things which are designed to show that we were not, as has been suggested, simply against diversity completely but were trying to take an even-handed approach. There are several things in this bill that will, in

fact, add materially in some instances to diversity jurisdiction for reasons which we think are sound and consistent.

The first, which will come on for hearing later on in our multiparty, multistate area is where there is simply no forum under existing law, State or Federal, that by reason of the restrictions on jurisdiction which exist can hear the whole controversy together. We approach this as something where there was a real reason for diversity, just as there now is in interpleader, where you can sue across State lines. We would allow nationwide service to bring before the most appropriate Federal court a controversy where people essential for the just disposition of the controversy were so scattered and dispersed that they couldn't be brought into a single forum in either State or Federal. Incidentally, the in-State plaintiff would not be barred from this aspect of Federal jurisdiction, where it's an essential function of the Federal judicial establishment to do something which no State could do, gathering together by use of nationwide process all of the parties needed.

Your counsel suggests to me that this is complex, and it is. We've tried to simplify it as much as we could and still achieve the basic purpose. My initial reaction to it was as his was—this is very largely the work of my associate, Professor Mishkin—but I found it much easier to say this is too complex than to sit down and do something that would clear up the difficulties and accomplish our purpose in a satisfactory way.

Senator BURDICK. The gist of the suggestion is that it would be impossible, in some States, to get personal jurisdiction over all the necessary—

Mr. FIELD. Yes, essentially.

We also did something which prevents a local party who wants to stay in his State court from doing so. This would be a local plaintiff who wanted to stay in the State court. Under existing law, there has to be complete diversity between all plaintiffs and all defendants. Professor Wechsler made a reference to *Strawbridge v. Curtis* yesterday as the case that so ruled. We thought one, that this was not constitutionally required, and the Supreme Court has since held that it is not of constitutional dimension, and two, that it was being used as an undesirable device to prevent removal.

In many cases where a corporation with a local establishment could and would probably remove, the plaintiff would join the local agent or servant in order to forestall removal, join the truck driver with the trucking company, the engineer with the railroad, whatever it might be, when the real object of his action was the employer. We would now take that type of employer out of Federal jurisdiction by the local establishment rule anyway.

But there remains the out-of-Stater without the local connection, and the most typical case would be the automobile accident where A is involved with B, and C, and B is local and C is not. At the moment, it's perfectly natural for the plaintiff to want to sue anyone who might possibly be liable. The purpose, presumably, is not to keep the case out of Federal court, but the out-of-State defendant is in the position of having to stay in the State court when, ironically enough, it may turn out to be the jury's choice whether to stick the local defendant or the out-of-State defendant in a multiple-car accident.

It seems to us that if that an out-of-State defendant is really an out-of-Stater and would be able to remove if sued alone, he ought to be able to remove despite the joinder of the local defendant. Whether or not one of the purposes of the joinder was to prevent removal is significant.

Senator GURNEY. The plaintiff might still join the local defendant who probably has no liability to speak of.

Mr. FIELD. No liability or no money to speak of, or both.

Senator GURNEY. Then C is the real culprit, the one who's really negligent must—he just can't remove.

Mr. FIELD. He cannot remove under present law, and we would allow him to, both in the extreme case where the liability of a local man is very, very dubious, but also in a not atypical case where you'd certainly sue them both if they were all locals. It's a pretty poor lawyer when there are two people, either one of whom may be the responsible cause of the accident, who will not sue them both if he can. Otherwise, the first defendant will say, "Who me? It's that fellow." Then if he loses that time and tries the second defendant, "Who me? It's that fellow." To have them both in court seeking to protect themselves, and hence, each helping you against the other, is what any lawyer with good sense would want to do.

Senator GURNEY. That's why it's very difficult to figure out just where the burden of these cases will shift after this law is passed, if it should be passed.

Now, here's a case where you're going to put more business in Federal courts. I don't know how many you have in a situation like this.

Mr. FIELD. There's no way to find out how many are involved. There's no possible way. It is not an important statistic from the point of view of any State, and I believe that States with the most able and efficient court administration would simply say, "Well, we don't keep that kind of record. There's no reason to."

I think committee counsel would be in accord with that.

So it is speculative, and this is one reason why any statement of what the total shift is is such a matter of guesswork that it's really foolish to try to make even an estimate of it.

Senator GURNEY. And making it more difficult to make an estimate is the fact that the Federal questions can be shifted.

Mr. FIELD. We also, in a matter that is of considerable importance in some cases, have concluded that an unincorporated association or partnership should be treated as a citizen of the place where its principal place of business is. The prime example is a case that was pending while our study was going on, and has now been decided by the Supreme Court, *United States v. Bouligny*, on the 10th page of my original submission. There a labor union was sued in North Carolina by a North Carolina corporation in a North Carolina State court, and the labor union wanted to remove and was not allowed to remove because some of its members were co-citizens of North Carolina with the corporation. This would now be changed.

Incidentally, in that case the Supreme Court indicated sympathy with the position of the party with the argument that unions should be considered as a citizen of the place of their principal of business, and pointed to our study, saying that it was for the Congress and not for the courts to bring about this change in the law. Again, the number

is unclear, but it does mean that you do not destroy diversity by looking to the citizenship of all of the members of an unincorporated group and thus fairly effectively keep it from making use of the Federal court in States where it has activity.

The next addition is where you have one suit plainly within the jurisdiction on a diversity basis, say you have a woman who is injured in a proper diversity case, and her claim is over \$10,000 and she can be in the Federal court. Her husband may have a claim for property damage to his car or for loss of consortium, or for any one of the small things that would not get him into the Federal court by themselves. There is no reason to have that case tried in two different forums, and we say the suit should be expanded to members of the family living in the same household, that they should be allowed to come in if the initial case is properly within the jurisdiction.

I make the point in my prepared statement that this is designed to cure the most obvious situation under existing law where it can't be done, and is not intended to preclude further development by the courts if they choose to do it, of this ancillary concept. There have been some cases that have come down since we prepared these proposals that in one way or another extend this notion farther. We are not trying to say that this proposal is intended to answer all possible problems and thus to indicate a congressional intent to preclude further amplification by the judicial process.

Finally we deal with the problem of the use of assignments of interest to create or defeat Federal jurisdiction. Since we wrote, the Supreme Court has held in the *Kramer v. Caribbean Mills* case, which I cite in my memorandum, that an assignment made for the purpose of creating diversity jurisdiction is to be disregarded under the existing 28 U.S.C. 1359.

But statutory treatment is, I think, necessary to cover the transfer, an object of which is to defeat Federal jurisdiction, which existing law would not do in the raw instances.

Senator BURDICK. Wouldn't that be a question in each case?

Mr. FIELD. That would be a fact question in each case. We tried to simplify the fact question by saying an object and not the object, so that in the situations where there may be multiple objects, one object is enough.

The characteristic case is assignment of 99 percent of the interest, and the retention of 1 percent. You don't need to go beyond these facts to say that the only likely reason for this is to create diversity. The *Caribbean Mills* case was that kind of case, but there surely will be cases where there will be a factual argument as to whether it was an object to create or defeat Federal jurisdiction.

I think they will be relatively few, and also the provision for an early determination and foreclosure of jurisdictional issues would keep an issue from dragging its way through the case all the way.

I think this covers, Senator, the points which seem to me the most important. I'll be very happy to try to answer questions that have not been dealt with in my original statement.

Senator BURDICK. I think you've done an excellent job in explaining the diversity section of the bill, a very commendable job, but I do have just a couple of questions here.

Mr. FIELD. I will make a note of them as I go along, and if I can't answer I will be glad to submit an answer later, but I hope I can answer them now.

Senator BURDICK. Do you think that the bill before us, if adopted and approved by the Congress and the President, would set a clear-in-principle jurisdictional policy?

Mr. FIELD. Yes.

Senator BURDICK. Which you favor?

Mr. FIELD. Oh, surely. I would not have gone this far if that had not been so, Senator, if I may say so.

Senator BURDICK. The basic approach in the diversity provision of the bill, to make a general statement, is to provide an equal level of justice to the traveler, and to the outsider.

Mr. FIELD. I would accept that as an accurate statement; yes.

Senator BURDICK. Do you have any questions?

Mr. MULLEN. Yes.

Senator BURDICK. The staff has a few questions.

Mr. MULLEN. Just to go over some points in regard to various other sections which you didn't cover in your basic testimony—section 1301 is adopted basically from the present section 1332 of title 28?

Mr. FIELD. Yes; basically, but with slight verbal change.

Mr. MULLEN. And you have not codified any of the exceptions with regard to probate matters or domestic relations or other exceptions?

Mr. FIELD. No; we have not. We made a try at it in one stage and we came to the conclusion that these judicially created exceptions, as you say, probate, domestic relations, and so on, were well established and that the phrase "any civil action" had been construed all through the history of it to imply these limitations. We were, on the whole, fearful that if we tried to improve upon the judicial construction by codifying it or even to reflect it by codifying it, we might fall into more trouble than we would if we left the presently well-understood language, fairly construed by the courts, just as it is.

Mr. MULLEN. In section 1301(b)(1), you have modified slightly the definition of "corporate citizenship." Could you explain the reasons for these changes?

Mr. FIELD. Well, we changed the word "any state" to "every state" in which a corporation has been incorporated, for the purpose of determining corporate citizenship. This was designed to settle a conflict of cases.

It seems to me that the proper construction of the existing language would be to construe "any state" as though it meant "every state," but there were cases of multiple-incorporated corporations where the courts had gone the other way. We thought that we would clarify it in the right direction by changing "any" to "every".

Mr. MULLEN. And you also intend to include alien corporations which have a principal place of business in a particular State?

Mr. FIELD. That's right. It was accomplished by putting the word "foreign" in the definition at two places. What we were concerned about was the case where a bunch of New York citizens, shall we say, decided to incorporate in Liberia, and some corporations did incorporate in Liberia because various Liberian laws were more helpful to what they wanted to do, particularly labor laws. We saw no reason why, if a group of New Yorkers chose to incorporate in Liberia and do business in New York—just as they would if they were indi-

viduals—we saw no reason why they should be able to say they were Liberians for the purpose of diversity jurisdiction. That factual situation was, when we originated it, hypothetical, but during the progress of our work, a case came down involving precisely that situation and the court did hold that the corporation was Liberian for the purposes of diversity jurisdiction. It seems to me that what we've done is right, and I don't believe it's regarded as objectionable by anybody.

Mr. MULLEN. I think you discussed this matter briefly before. Under section 1301(b)(2), the bill treats a partnership or other unincorporated association as a citizen of the State where it has its principal place of business.

Could you comment briefly on that?

Mr. FIELD. The present Federal rules in diversity cases look to State law and it seemed to us that a Federal standard for diversity purposes was right. And if there was to be a Federal standard, it should be the principal place of business, which it has been ruled in cases of Federal venue already. This, again, I don't believe is controversial, but it is designed to resolve what seems to us a minor problem.

Senator BURDICK. And you think the distinction is justified between the corporation and an unincorporated association? That those are different?

Mr. FIELD. Yes; they are different. They have to be different, for one reason, because the rule about a corporation refers to the State where it's incorporated, and by hypothesis, the unincorporated association isn't incorporated, so you make the citizenship of a corporation either where it's incorporated or its principal place of business is. Although the wording is different, the result is the same with the unincorporated association because it isn't incorporated.

Mr. MULLEN. And this allows diversity jurisdiction, in cases involving partnerships, even when one or two partners might happen to be residents of the State of the opposing party?

Mr. FIELD. That's right.

Mr. MULLEN. Section 1301(b)(3) prevents reliance on a State direct action statute. Does this carry forward, basically, the amendment to section 1332(c) enacted by Congress in 1964?

Mr. FIELD. Yes. It simply incorporates what Congress has already done. Our approach was, assuming that the bill would become law, to make it complete within itself. Here is something that Congress has already done, and we simply preserved it with no change in language whatsoever.

Mr. MULLEN. Section 1301(e) relates to the joining of claims of family members. In the commentary relating to this section you make no statutory change as far as the judicial development of ancillary jurisdiction under the case law.

Mr. FIELD. I did say that, and I did say that there had been such ancillary jurisdiction developments since we wrote. There is one thing which I think I would like to put in as a word of caution which, as I recall it, was in my prepared testimony. While I would in no way seek to preclude this type of development by the courts of the ancillary concept, I see some hazard when it is used for other purposes than the lack of jurisdictional amount because it could be used to defeat other sections of the bill.

Mr. MULLEN. Do you think that you could study some of these recent cases and perhaps furnish us with your comments on those you feel might be contrary to the general policy of section 1302?

Mr. FIELD. Certainly. It seems to me rather obvious, but I'd be glad to amplify it in writing if you'd like.

Mr. MULLEN. If you could comment, if you would, on some of the case law.

Mr. FIELD. I'll make a note of that.

Senator BURDICK. Professor Field, I just want to know what your thermostat says in regard to food. Do you wish to keep going until we finish, or would you like to break for lunch?

Mr. FIELD. Again, I'm in your hands, Mr. Chairman. I'm happy to do whichever—

Senator BURDICK. I'm giving you the option. We can come back in an hour easily, to finish, or if you want to go ahead and finish. We have a few more questions here.

Mr. FIELD. Have you any judgment as to how long it would take to finish?

Senator BURDICK. I think we can finish in 20 minutes.

Mr. FIELD. My stomach is not calling for relief yet, and if it's more convenient for the committee, or as convenient, I would rather go on.

Senator BURDICK. Let's go right on, then.

Mr. MULLEN. Could I ask a couple of questions in regard to section 1302(b). Let's suppose that we had an arrangement where a corporation was involved in leasing computer equipment and that their operations were centered in Minneapolis, Minn., and their offices and their displays and so on were in Minneapolis. Buyers from other States came there and made their purchases there. Delivery was made in other States. And let's say one purchaser was in Denver, Colo.

If that buyer in Denver were later to bring an action for a breach of warranty suit in Colorado, even though—and let us assume further this corporation has maintenance crews or had a local office of some other kind in Colorado—that corporation would still be able to remove the case if it were brought originally in a State court, am I correct in that?

Mr. FIELD. Yes, because the claim would not arise out of the activity of the local establishment. That's correct.

Mr. MULLEN. And the same result would be true, assuming that that company had salesmen who just flew in on a day-to-day basis to Colorado or Wyoming or other States, but they really had no office or permanent establishment.

Mr. FIELD. That is also true.

Mr. MULLEN. Let us assume that part of the leasing contract required the corporation to furnish maintenance on their computers in Colorado.

Now, assuming that the corporation flew in their maintenance men whenever trouble arose, that alone still would not create a local establishment?

Mr. FIELD. No, it might very well serve as a basis for State court jurisdiction under its long-arm statute, but it would not affect the problem of the—

Mr. MULLEN. But if, however, the corporation had this maintenance operation set up an office in Denver, and the men who manned it lived in that State and worked there regularly, and then an action arose out of a breach of this maintenance part of the lease agreement, what would the effect be in that case?

Mr. FIELD. To be sure that I have your question correctly the fact that they had maintenance people fixing things would not affect, even though in the local establishment, the provision would not affect the right of removal under the contract.

If the fault lay in the way the maintenance was done, it would.

Mr. MULLEN. Certainly. In other words, if an action were brought for a breach of warranty relating to the original leasing agreement, removal would be permitted, but if it were merely out of this local activity of maintenance, then removal would not be permitted.

Mr. FIELD. Right, assuming that the maintenance was done in the local establishment. Quite right.

Mr. MULLEN. Thank you.

Senator BURDICK. The key to this thing is whether or not the corporation has a local establishment; isn't it?

Mr. FIELD. The key is whether or not it had a local establishment and whether the claim arose out of activity connected with the local establishment.

Mr. MULLEN. So again, to go back to the type of situation that Senator Gurney raised earlier, even though a corporation has a local establishment within the State, it is restricted to the State court only in actions arising out of the activities of that local establishment?

Mr. FIELD. That's correct.

Mr. MULLEN. Section 1302(e) relates to workman's compensation.

In this section, as I understand it, is an extension of the present section 1445(c), which prohibits removal of workmen's compensation?

Mr. FIELD. Yes, that's correct. I think it's correct to say that this is simply a reflection of an already established policy by Congress, as applied to an aspect of the problem which has developed since. The present law preventing removal obviously took care of a good deal of it, but it led to the unseemly business in Texas, which is the State where most of the problems arose, of a race to the courthouse to see who could get there first, because the law didn't affect original jurisdiction and either the claimant or the employer insured could litigate it in court. There is one case which I think we specifically mentioned where the footrace resulted in a 4-minute victory for one or the other side, and the case was held properly in the Federal court because of the 4 minutes.

It seemed to us that what we were doing was simply carrying forward something that the Congress would have done originally had the abuse been manifest.

Mr. MULLEN. Could I go back to one point discussed earlier, the exception in section 1302(b) for organizations not engaged in a business activity. Wasn't one of the reasons discussed during the Institute's meetings, the complexity of organizations such as the Boy Scouts and Elks, and other kinds of fraternal organizations?

Mr. FIELD. Yes, I think I mentioned that, although I'm not sure I did, to Senator Gurney. I referred to two factors. One was the visible competition and the other was the difficulty of definition because of the complexity of some of these organizations. That's right.

Mr. MULLEN. And that could lead to unnecessary litigation and delay over trying to define those organizations, whereas with corporations or business enterprises, it's usually easy to identify.

Mr. FIELD. Quite right.

Mr. MULLEN. On page 9 of the bill, subsection 1302(e), it says that no district court shall have jurisdiction under that subsection of any civil action arising under the workman's compensation laws of any State.

What does "that" refer to in line 1?

Mr. FIELD. I'm puzzled by it. I should think it ought to be "this" rather than "that."

May I look at the bill as we originally wrote it?

Mr. MULLEN. Certainly. That's on page 14 of your study.

Mr. FIELD. It refers back, I think, to section 1301(a), but that's not a particularly apt way to do it, I'm afraid, because of the puzzlement suggested by you.

Mr. MULLEN. Yes, I realize that sections 1301 and 1302 are inter-related. It just was unclear to me what "that" referred back to.

Mr. FIELD. I can understand this because it was unclear to me when thrown at me cold.

Mr. MULLEN. Could I ask a few questions in regard to section 1303 on venue. As I understand it, the most important provision, new provision, that you have for venue allows venue in a district where a substantial part of the events or omissions giving rise to the claim occurred.

Could you just comment on the reasons for this?

Mr. FIELD. In the first place, my first comment would be that Congress has already almost done this. The history of it is that several years ago a provision to this effect was made with respect to a motor vehicle case.

At that time I had some correspondence with the Judiciary Committee, in which I was asked to state the Law Institute's position with respect to it, and I indicated an endorsement of it as far as it went. It was consistent with what we were in the process of doing. But I suggested that logically it should go farther and not be restricted to motor vehicle cases.

Congress first passed it in the restricted form, and then subsequently broadened it so as to have it cover all cases, which substantially does what we do. We were fearful of the assumption seemingly implicit in the bill in the language "where the claim arose" as being a matter of dispute with the implication that a claim can only arise in one place and that our language, "a substantial part of the events giving rise to the claim," was better language.

For example, if the supposed negligent act occurred in State A and the injury occurred in State B, you could argue that the claim arose under the present language in either State, whereas we are trying to say that so far as Federal venue is concerned, either one is all right because the claim arose, at least in part, in both places.

Senator BURDICK. At this point I don't see any substantial difference under 1303(a) between subsection 1 and subsection 3. They say the same things.

Mr. FIELD. 1303(a)(1) and subsection (3).

Senator BURDICK. They say the same thing.

Mr. FIELD. If I understand your question, in the first place, in the typical case, 1303(a) covers it for a substantial part of the events occurring but if the claim arose outside the United States, there would be no venue where it could—

Senator BURDICK. Add that feature to it, yes.

Mr. FIELD. We provided only for the relatively rare situation where the wrong occurs abroad.

Senator BURDICK. But where the event took place, substantial events would take precedence for venue.

Mr. FIELD. Well, we give a choice in the case where the claim arises in the United States between (1) where the events occur, and (2) if all the defendants reside in the same State but in different districts, subsection (2) says either district will serve.

Mr. MULLEN. In section 1303(b), you have defined corporate venue, and as I understand it, the purpose is to prevent the plaintiff from shopping at large for a forum.

You have defined the venue to be proper in any district in the State of incorporation or in the district where the corporation has its principal place of business, and also in any district where the events were given rise to the claim occurred?

Mr. FIELD. That is right, and the reason you suggest is the reason today under the present section 1391, a corporation can be sued so far as venue is concerned in any judicial district in which it is incorporated or licensed to do the business or is doing business, and such districts shall be regarded as the residence for venue purposes.

This would, unless changed, enable a plaintiff to look anywhere where a corporation was doing business and say, "Ha, ha, we'll sue him here." As we propose to change it, he would have the most obvious venue where the events arose, which means, I think, normally, no hardship to the plaintiff, and would be given other options only in the case where for some reason that venue wouldn't work.

It seems to me in no way to give a corporation any advantage over what it now has in determination of place of suit that it ought not to have, and probably could get by a transfer if an inconvenient and remote place were picked. We remove the plaintiff's residence for the reasons already covered in discussing the in-State plaintiff provision.

Mr. MULLEN. In section 1304(b), relating to removal when there are two or more defendants, I believe that you have some special provisions in regard to third-party defendants.

Mr. FIELD. That's right. I think that I covered the basic question earlier in my testimony. So far as a third-party defendant is concerned, we don't want it to be usable as a device, if I may say so, and the part of that section dealing with it, which is lines 21 and the following on page 10 of the bill, hits what seem to me the most obvious situations where it might be abused, one of which is when both are insured by the same insurer and one is where there is an employer-employee relation, and so on.

The reason is to prevent what we think would be a potential abuse of what is a sound principle.

Mr. MULLEN. The policy of these subsections is similar to the provisions in regard to the direct action statute. You're looking to the parties who are probably involved in the basic controversy, and when there's a special relationship such as insurance, you say we will look to the primary parties.

Mr. FIELD. That's absolutely correct.

Mr. MULLEN. Could you look at section 1305 in regard to the change of venue by a defendant. As I understand this subsection, the policy basically is that transfer should be dependent solely on whether or not it's for the convenience of the parties and the witnesses.

Mr. FIELD. That's right. The present section, 1404(a), I think is rather unfortunately worded because it says "for the convenience of parties and witnesses, in the interest of justice," and that can be and has been construed that you must have convenience of parties and witnesses, and then in the interest of justice is a kind of parenthetical insertion.

Our language would alter that by saying "for convenience of parties and witnesses or otherwise in the interest of justice." It is simply to clarify a possible ambiguity in existing language.

Mr. MULLEN. And you have eliminated the unfortunate "might have been brought" language?

Mr. FIELD. That's right. The Supreme Court, in the case of *Hoffman v. Blaski*, gave a very restrictive meaning to the congressional language in 1404(a). Whether it was proper under existing language is a matter upon which lawyers may differ, as the Supreme Court did within itself. But whether that is right under existing language or not, we think that it does cut down the potential use of the transfer device in a way that Congress didn't contemplate or would have contemplated had it realized how it was to be restricted.

Mr. MULLEN. And section 1305(b) makes clear, however, that the defendant cannot request transfer to a district where both the plaintiff and the defendant seeking transfer would have been barred under section 1302.

Mr. FIELD. That is right. We did not want the transfer section to be used as a device for avoiding the restrictions which I've spent so much time this morning talking about, with respect to original diversity jurisdiction.

Mr. MULLEN. And section 1305(c) provides that if a defendant requests change of venue, then the transferee court must apply the choice-of-law rules that the transferor court would have been bound to apply.

In other words, you're codifying, in a sense, *Van Dusen v. Barrack*.

Mr. FIELD. That's right. It seems to us that when a plaintiff exercises his traditional right to choose a forum, if he chooses it and it's a proper forum under existing law, that it unhappily complicates the situation if there is a problem whether the interest of justice includes applicable conflict-of-laws rule of the forum.

The case that gave rise to the problem, *Barrack v. Van Dusen*, was whether when the plaintiffs brought actions in the Eastern District of Pennsylvania the defendant should be able to transfer them to Massachusetts, and the Pennsylvania choice-of-law rule was plainly more favorable to the plaintiff than the Massachusetts one almost surely would have been. We did not want the question of the appropriate location of the courtroom to be confused with the question of which was the better rule of substantive law to apply.

It would seem likely that the Massachusetts judges would have thought that the Massachusetts rule was a better one and tended to apply it, and hence we tried to prevent it.

Mr. MULLEN. May I say that if the *Klaxon* rule is to be preserved, which was the judgment of the Institute, and I'm in agreement with you, but I think that we may, at a later time, wish to look at that problem further.

Mr. FIELD. This was on the premise, and with the words, "would have been bound to apply." "Would have been bound to apply" was in reference to the *Klaxon* rule where the choice of law of the State is controlling. However, whether *Klaxon* goes or stays is not very material to this section because the words "would have been bound to apply" would cease to apply if the *Klaxon* case were dropped out.

I may say that I favor the *Klaxon* rule for many reasons not particularly germane to this study, but your point is correct.

Mr. MULLEN. Section 1306 is related to change of venue by the plaintiff. I believe that there are more restrictions on the plaintiff in regard to his ability to request transfer.

Mr. FIELD. Yes; and we think there should be. We limit the plaintiff to a venue that would be proper originally, and where the defendant was amenable to process. We don't want, in other words, to create nationwide service by allowing the plaintiff to sue anywhere and transfer back to the proper place under this section.

Hence, the process limitation and the further limitation that if he is in the wrong venue and wants to change, then it is the transferee venue that would control, and not the transferor venue, because this is a choice among choices of law that he shouldn't be able to achieve by going deliberately to the wrong place to sue and being transferred back.

Senator BURDICK. Well, thank you, Professor Field. You've been testifying now for almost 3 hours, and you're certainly added a considerable amount to our hearing today. We have a good record and you've answered many questions that needed answering. All I can say is that when you get back to Harvard, tell your class that we appreciate the sabbatical that they gave you.

Mr. Field. I appreciate your comments very much.

Senator BURDICK. The committee will be in recess until 10 tomorrow.

(Whereupon, at 1 p.m., the subcommittee recessed to reconvene at 4 a.m., Thursday, September 30.)

THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS

THURSDAY, SEPTEMBER 30, 1971

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN
JUDICIAL MACHINERY OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2228, New Senate Office Building, Senator Quentin N. Burdick (chairman) presiding.

Present: Senator Burdick.

Also present: William P. Westphal, chief counsel; Michael J. Mullen, assistant counsel; Kathryn M. Coulter, chief clerk.

Senator BURDICK. The subcommittee will come to order.

We are honored this morning to have two members of the judiciary here to testify on this question. The first witness I will call will be the Honorable Clement F. Haynsworth, the chief judge of the Fourth Circuit Court of Appeals.

Judge Haynsworth has a very impressive background. He graduated from the Harvard Law School in 1936 and was in private practice from that time until 1957, with the exception of 3 years' service in the Navy during World War II. In 1957, he was appointed to the U.S. Court of Appeals for the Fourth Circuit and has been chief judge of that circuit since 1964.

Judge Haynsworth is a member of the American Law Institute, the American Bar Association, South Carolina Bar Association, the American Judicature Society of which he is a member of the board of directors, and the Institute of Judicial Administration.

Sir, it is good to see you. You may proceed in any way you wish.

STATEMENT OF CLEMENT F. HAYNSWORTH, JR., CHIEF JUDGE, FOURTH JUDICIAL DISTRICT OF THE UNITED STATES

Judge HAYNSWORTH. Thank you, Mr. Chairman.

First let me say I appreciate the invitation to appear here today. I have felt very strongly about these proposals and the need for passage of this bill, and I am particularly glad to have the chance to lend my small voice in its support.

I have filed a written statement. Unless you wish me to, I don't propose to repeat all that I have said, but I do want to comment about some of the things I said in the written statement, and, of course, I will be glad to respond to anything you would like to hear me speak to, Mr. Chairman.

Senator BURDICK. Your full statement will be made a part of the record at this point.

(The statement of Clement F. Haynsworth, Jr., in full follows:)

STATEMENT OF CLEMENT F. HAYNSWORTH, JR., CHIEF JUDGE, FOURTH JUDICIAL CIRCUIT OF THE UNITED STATES

I appreciate this opportunity to appear as a witness in support of the proposals of the American Law Institute respecting the division of jurisdiction between the state and federal courts. The Chairman has informed me that the reporters will discuss the proposals in detail, and has suggested that I discuss particularly the diversity proposals in a very general way from the point of view of the working judge.

There are some who, from time to time, have advocated the abolition of the diversity jurisdiction. I am not one of those. I strongly favor its retention. There is still reason for concern that in some state courts there may be bias against out-of-state litigants. I wish it retained for another reason. It keeps federal judges in contact with the common law and its evolving principles. The common law is the base of so many of our laws that continuing direct experience with it enables a judge to approach federal questions with greater enlightenment and a broader current experience than he otherwise could. Too much specialization may result in a narrow approach and a failure to appreciate underlying equities which continuing experience with the common law would illuminate.

I am in thorough agreement with Charles Alan Wright, however, that the diversity jurisdiction should encompass all cases which have a real reason for being there and exclude all of those which do not. The American Law Institute's proposals have been developed to present a reasoned, consistent plan for revision of the diversity jurisdiction, so that it will, indeed, include those cases where there is real reason for their inclusion and which will exclude those when there is no such reason. To me it makes no sense, for instance, to treat a man as a noncitizen of New York who has spent all of his working life there and participates actively in its business and civic affairs, though he commutes from his residence in New Jersey. He is simply not the kind of person who, as a plaintiff or as a defendant in a state court in New York City, ought to be authorized to invoke federal jurisdiction.

Mr. Chairman, you have said that these proposals would "provide a clear and principled division" of cases between the state and federal systems. They, indeed, do accomplish that, and that is their primary virtue.

There are many other things to be gained from the adoption of the proposals. One of the most important of these will be a great reduction in litigation over jurisdictional questions. A judicial system is terribly inefficient if it must spend a substantial amount of time attempting to decide whether or not it can decide the substantive controversy.

Let me burden you with three illustrations.

In *Lester v. McFadden*, 4 Cir., 415 F. 2d 1101, a South Carolinian was struck and killed by a South Carolina owned vehicle operated by a South Carolinian. The lawyers for the estate of the decedent procured the appointment of a Georgia administrator for the purpose of bringing a wrongful death action in the district court. We held that this was a pretensive manufacture of diversity within the prohibition of 28 U.S.C. § 1359, but we were required to devote much judicial time and effort to the problem, while, at the same time, finding some means to save the verdict in the court below, for the case had been tried without any objection to the jurisdiction.

With perhaps as much frequency, the same kind of situation arises in reverse. There is a case in my court now arising out of the death in North Carolina of a young boy from Florida. His father as general administrator, appointed in Florida, sought to bring a wrongful death action in North Carolina against a North Carolina defendant. He was thrown out of the district court because of noncompliance with a North Carolina statute requiring that such actions should be prosecuted in the name of a resident North Carolina administrator. Another wrongful death action was filed in the district court, this time with a North Carolina administrator as plaintiff. There were allegations of diversity of citizenship, but when the case came on for trial, the judge held that diversity was determined by looking to the citizenship of the administrator, and he dismissed the proceeding for lack of diversity.

We are wrestling with the problem of that case now. In this situation there is no such statute as 28 U.S.C. §1359, and it might be said that we could avoid our jurisdictional decisional difficulties by a rigid invocation of the rule of *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, but is this really fair? If the boy had survived, he, unquestionably, could have brought an action for his personal injuries in the diversity jurisdiction in North Carolina. The fact that his injuries proved fatal and the action was prosecuted for the benefit of Florida beneficiaries makes the controversy no less interstate in nature. Moreover, North Carolina does not treat the administrator as the real party in interest; under its state rule the Florida beneficiaries are regarded as the real parties in interest. There seems no reason why federal law should enshrine him with a dignity state law denies him. Finally, in this case the statute of limitations had run before the action was dismissed in the district court, so that if the federal court is not now open, no court is.

Both of the problems that I have mentioned are clearly and easily solved under the ALI proposals. In both instances, for diversity purposes, the citizenship of the decedent would be ascribed to the administrator. This would produce a just result in both cases without the necessity of litigation about it.

There is another recurring problem represented by another case now pending in my court. A New York corporation has its executive and sales offices in New York and its manufacturing plants in North Carolina. Litigation in North Carolina involving that corporation is properly in the district court, unless North Carolina is its principal place of business. This is not an easy question to answer, for the executive offices have always been in New York; the sales offices must be there, for that is where the market is, and, unquestionably, North Carolina manufacturing operations are directed out of New York. On the other hand, the controversy arose out of the manufacturing operations in North Carolina. If the ALI proposals were adopted, therefore, we would have an easy answer. Meanwhile, however, the parties and the courts are burdened with the necessity of litigating such questions.

I hope these three cases will serve to illustrate the kinds of problems which adoption of the ALI proposals will solve, freeing parties from burdensome jurisdictional litigation and enabling courts to swiftly weed out the cases which do not belong in them and to come more quickly to grips with the substantive issues presented in cases properly before them.

Finally, I wish to commend the proposed revision of the three-judge court statute. The tremendous increase in the number of cases requiring invocation of that statute has converted it into a great burden for us all. Its provision for direct review by the Supreme Court makes it burdensome to that court, as for the rest of us. The proposal would eliminate the necessity of convening a three-judge district court except when an injunction against the enforcement of a state statute was sought on grounds that the statute was unconstitutional, and then only if the state officials requested the convening of such a court. Most of the three-judge districts court in the Fourth Circuit are convened at the request of plaintiffs seeking injunctive relief, and Congress was not in the least concerned with their sensibilities when the three-judge court statute was enacted. Surely now the Congress and the President may decide that federal officials are not so sensitive that litigation involving federal statutes may not pursue the usual course, while providing for the protection of the sensibilities of state officials when, but only when, they request a three-judge court.

It is a pleasure, Mr. Chairman and gentlemen, to be with you.

Judge HAYNSWORTH. My objective in the written statement was not to go through the proposal in detail or to comment on the many and important things that it would achieve but to sort of take a cursory view of the general diversity proposals from the point of view of a working judge and the practical effect it would have in the solution of a number of rather pressing problems we face today.

In the first place let me repeat what I said in the statement and that is, I feel very strongly that the diversity jurisdiction should be retained.

I think there is a basis in some cases for the thought that an out-of-State party may encounter some bias in some State courts. This is certainly not true of all of them but it is true of some of them.

Senator BURDICK. Are you aware there is some thinking in the judicial circles where they contend that diversity should be abolished all together?

Judge HAYNSWORTH. I am aware that some people think that but I don't think so. I think there is reason for its retention. I think most people who have gone into this with care, and it certainly was the conclusion of the Institute, the Institute went into this very closely, their conclusion was that it ought to be retained but on the basis that only those cases that have reason to be in the Federal jurisdiction should be heard and the cases should be brought in only when there is good reason for it and this is particularly true in such things as dispersed party suits where States simply can't reach all of the parties that are involved.

Senator BURDICK. That is where the State court can't get personal jurisdiction of all of the parties?

Judge HAYNSWORTH. That is right, when no State court could. In cases like that the courts of the United States could serve a real purpose.

Then I have another reason I mentioned for my feeling about the retention of diversity and that is that it refreshes the judges and keeps them alive because this is the main vehicle that keeps us in touch with the common law and its evolving principles. And these underlie so many of the questions that come in the Federal question jurisdiction. So unless you are in touch with it constantly, these become dull in the mind. You forget them and there has been some experience with specialized courts where the specialists become so immersed in their one little field that they forget about the underlying principles of the common law that may have much to do with what they do and they come up with results that sometimes seem quite wrong.

But the very fact that we are called upon to work in this field, I think and many of my colleagues feel the same way as I do, makes us better prepared by far to work in all of the fields or in other fields in cases that come before us.

This is of some importance not only to us but to the courts and the way they function.

And the diversity proposals I have said, without going into detail about them all, I do think are a very sound attempt to retain in the diversity jurisdiction those cases for which there is a real reason for retention and to exclude those for which there is none. There are examples all of the way through. One is the fact that a man who spent all of his working life in New York and who takes an active part in the civic affairs of New York City ought not to be treated as a non-citizen of New York simply because he sleeps in New Jersey.

Senator BURDICK. You are referring to the commuter situation?

Judge HAYNSWORTH. Yes, and on the other hand, a corporation that has a big part in the economic life of a State because they have a big factory there that employs a great many people ought not to be treated as a noncitizen simply because its principal place of business is somewhere else.

Such things really don't make sense when you stop and look at them or they don't to me anyway and they didn't to the Institute. And this would rectify all of that and in the process greatly reduce the time spent, in the requirements of time and effort, to decide whether or

not a court can decide a case. This to me is a dreadful waste of time and a blot on the effectiveness of any system.

Of course we must spend now a substantial amount of time looking at the court's capacity to decide a case, and these things come up with great frequency. And three illustrations I have occurred in my court. Two of them are still pending. One case in point was when a South Carolinian was struck and killed by a South Carolina owned vehicle operated by a South Carolinian. The lawyers for the estate of the decedent procured the appointment of a Georgia administrator for the purpose of bringing a wrongful death action in the district court. We held that this was a pretensive manufacture of diversity in violation of the statute which forbids that. The third circuit has held the same thing.

Mind you, this doesn't stop the controversy because each case is going to depend on its own factual situation. The next case may be where a foreign administrator is a relation. The result might be quite different.

Senator BURDICK. In the first case they actually manufactured diversity?

Judge HAYNESWORTH. Yes, sir. If the foreign administrator was the son of the decedent and looked after her affairs and things like that, then we would not reach the same result. So that under the present rule it means that each case has to be looked at and this means the district court has to spend judicial time and effort and if the parties then do not like the result, they can appeal to the court of appeals and it will have to spend a great deal of judicial time and effort also in getting the answer to the preliminary question: Can we hear this case or not. And this is a dreadful waste of time.

Of course under the proposals, if they are adopted, why the answer is quite simple. There is no reason to have anybody bring a lawsuit about it.

The next case is one in a State which requires that a wrongful death action be brought in the name of a resident administrator. We have this case now in connection with North Carolina where the decedent was a young boy from Florida and his father, who lives in Florida, was required to proceed in North Carolina in the name of a North Carolina administrator and his action was dismissed on the ground that there was no diversity. And the question in our court now is whether the administrator under the laws of North Carolina is the real party in interest or whether the Florida beneficiaries are.

Well, this takes quite a lot of time again to come to a conclusion. When we get done there, we'll settle the question with respect to that one State but Virginia has the same kind of statute and so does West Virginia and our conclusions with respect to those States may not be the same but we must go into it. So, the controversy doesn't end when you decide one case.

The question under the diversity jurisdiction about the principal place of business of a corporation is even worse because each case presents its own peculiar fact situation. The one I mentioned now pending is the case of a corporation with its sales offices and its executive offices in New York with manufacturing plants in North Carolina but certainly directed from New York.

The question is whether North Carolina is the principal place of business and the dispute is about the cost of electric power to a manufacturing plant in that State. It is the kind of thing under the ALI proposal where there would be no doubt about it; it would go to the State court and not to the district court.

That is a real question now but the question we have now would be answered if we should find that North Carolina really is the principal place of business. The view would be altered if it had plants in more than one State. Each factual situation would require separate litigation in the district court.

The district court would decide the question, and then the court of appeals and so you don't get done ever. While all of this goes on you frequently run into the problem of the running of the statute of limitations. This has happened in the North Carolina wrongful death case and it happened in the South Carolina case where the statute had expired so that the State courts were foreclosed.

This is a harsh result if a party makes the wrong choice of a court and he finally finds out that he has made an error, he is completely out of all courts by the statute of limitation. Of course the ALI proposal has a special provision about that which stays the statute for 30 days at least after he is thrown out of one court, State or Federal, on the grounds that he went to the wrong court.

Now, this is the kind of wasteful effort that interferes with the effective functioning of the courts which adoption of the proposals here would avoid by providing simple answers that are easily applied so that the courts ought to be able to spend more time and come more quickly to grips with the substantive issues they are to meet.

Senator BURDICK. Do you think this proposal would save a lot of time?

Judge HAYNSWORTH. Oh, I am sure it would. I think it would help the efficiency of the district courts a great deal without imposing any great burden on the State courts, because the proportion of cases that would be taken out of the district courts and put into the State courts would be sufficiently small so that they can absorb that burden.

It is not as though we were going to withdraw completely from that jurisdiction. So I think in countless ways it would rationalize this whole thing and greatly improve the effectiveness of the courts of the United States, and for such reasons, Mr. Chairman, I strongly support the ALI proposals.

Senator BURDICK. You strongly support the bill?

Judge HAYNSWORTH. I certainly do, sir. I have been immersed in the ALI proposals for a long time and I do support the bill.

Senator BURDICK. It removes an awful lot of uncertainty, and as you say, it would save the courts a lot of time dealing with matters that don't go to the heart of the question. On this question of corporations, the ALI proposals refer to giving or finding diversity based upon a local establishment as distinguished from the corporation's principal place of business. Would you like to speak to that suggestion?

Judge HAYNSWORTH. Of course, this is the answer to the problem of the particular case that I mentioned that we have now. This would treat a corporation as a citizen of each State in which it is incorporated; where it has its principal place of business and adding every other

State where it has had a local establishment for 2 years; that is, with respect to controversies growing out of the operation of that local establishment.

But you get a corporation with a farflung enterprise with plants in a number of States that have been there for years and years, they ought to be treated as local to the States with respect to the operations of those plants in those States, and this would do that.

Senator BURDICK. In other words, to give you an illustration, *A* would be a domestic corporation, and *B* would be a foreign corporation with a local establishment. They do the same kind of business. They are existing side by side in the community. To the average person, they see no differences.

Judge HAYNSWORTH. None whatsoever.

Senator BURDICK. And they should be treated alike?

Judge HAYNSWORTH. Yes.

Senator BURDICK. Now, what do you think about the in-State plaintiff? This is one of the biggest changes in diversity in this bill to not permit the in-State plaintiff to seek Federal jurisdiction. Do you see any reason why we should be able to?

Judge HAYNSWORTH. No, sir. This is one of the means by which the number of cases would be substantially reduced because much of the selection is made by in-State plaintiffs. The diversity jurisdiction was provided for the protection of the foreigner and not for the in-State plaintiff or defendant. If the out-of-State man, plaintiff, chooses to go in the State court, the in-State party should not have the right to remove it. The choice should be with the out-of-State party whether he be plaintiff or defendant.

If diversity jurisdiction has any real reason at all, it is for the protection of the out-of-State man, and he should have that choice, but there is no reason in the world to give that to the in-State party.

Senator BURDICK. I can agree with you. Yesterday and the day before, there were some questions developed from the testimony that this bill might increase the load on State courts which are heavily loaded now. But, when it was analyzed, it is clear that this bill does not remove all diversity questions and that number of cases shifted is very small in comparison with State court civil caseloads. Also, the Federal courts will handle cases like these multiparty and multistate cases. Some Federal question cases would also go to Federal courts which went to State courts. So there is a little shift here, but the testimony showed that there would be a relatively small percentage of an increase in State courts because of this shifting back and forth, because some cases would go to the Federal courts and some cases would go back to the State courts, but the end result would be a very insignificant change.

Judge HAYNSWORTH. That is what I thought from the outset. I have not been into that in detail to have any data to back up that impression, but this is what I think the bill would do. It would, of course, draw some cases into the jurisdiction where they are not now, and it would also exclude some.

Senator BURDICK. That seemed to be the feeling of several of the witnesses we heard that there might be a small increase in the State court's caseload but not an appreciable amount.

Judge HAYNSWORTH. This proposal would result in a net transfer of some cases to the State courts, but the number would be so small in relation to the business of the State courts that I should think the impact of any such transfer upon the State courts would be slight or negligible.

Senator BURDICK. In your letter to the subcommittee, of May 31, you stated that the Institute's proposals, having been considered by all of the active judges in the fourth circuit, you state that the substance of the proposal was unanimously approved after each judge had studied them, and they have been since lively discussed at a general conference session.

Judge HAYNSWORTH. This is true. We discussed this on more than one occasion. On two successive occasions, we discussed them in great detail. Charles Wright and Dick Field and others were there, and we explored them extensively, and then after all of that was done, I asked each judge if he would spend some time on his own going through these and come prepared to vote as to whether or not he approved of them in substance.

I did tell them in this I did not want to get into a section-by-section debate, that one would like this word changed or that word changed. I did not get into that. But there was a motion that we approved the substance of the proposals, and everyone did approve highly with no exception.

Senator BURDICK. And that is the position of the fourth circuit then?

Judge HAYNSWORTH. Yes, sir.

Senator BURDICK. Did that also extend to the other provisions, or was that just on the question of diversity?

Judge HAYNSWORTH. Oh, no. The entire proposals.

Senator BURDICK. The entire proposals.

Judge HAYNSWORTH. The entire proposals.

Senator BURDICK. In other words, they must have thought that the A.L.J. did a pretty good job?

Judge HAYNSWORTH. They did.

Senator BURDICK. Of course, if you look at the members and the people who sat upon these proposals, there were some pretty distinguished lawyers and jurists throughout the country there, and based on the testimony, it was given lots of time and study.

Judge HAYNSWORTH. It was and we had outstanding men as reporters. Dick Field and Charlie Wright are both first-class fellows. The advisory men were excellent. The Council was outstanding. And the membership at large devoted a great deal of time to these and they were well thought out over a period of years. It is not as if someone sought to get this up in a matter of weeks or something like that. They received a lot of thought and rethinking again and again and think the proposals that finally came out of this are as well thought through and reasoned as one could expect any big task like this could be.

Senator BURDICK. I presume you might find a few trial lawyers that might disagree, that have been used to making use of the option or having this option.

Judge HAYNSWORTH. As my friend John Frank from Arizona goes around making speeches, he states he doesn't want anything changed because he is a practicing lawyer and he wants his options

to remain as they are now. He thinks he has more options now than he would if this bill were adopted. And John can make a pleasing speech about it and that is all right. But I simply think John is wrong. I think the courts in order to have effective functioning of the courts are much more important than preserving the option of an individual lawyer.

Senator BURDICK. This then makes a rational and sound division of responsibility and it doesn't base it upon a shopping selection by trial lawyers?

Judge HAYNSWORTH. Yes, sir. And I think the question here is: "Should it be approved on the basis that it really is as reasoned a proposal as I think it is?" And I think its merits should be recognized and it should not be laid on the shelf because some lawyers might say it will hurt me in my law practice somehow.

Senator BURDICK. I would like to ask you a few questions about the three-judge courts if you don't mind.

Judge HAYNSWORTH. Yes.

Senator BURDICK. While we are not at these hearings considering the details of the bill relating to the convening of the three-judge courts, but since I have you here and have the benefit of your wide experience I am greatly interested in the testimony that you have given on that subject as apart from the diversity question.

Judge HAYNSWORTH. Mr. Chairman, the three-judge-court business has mushroomed in the last few years in the Fourth Circuit and I know it has in the Fifth. My impression is that it has elsewhere, too. Well, while I know it has elsewhere, I don't know whether it has uniformly in all circuits. I know it has in the Fourth Circuit and I know it has in the Fifth.

And it is a backbreaking experience because it is disruptive of the court of appeals because at least one of the members of the three-judge court must come from the court of appeals and instead of having one district judge give his time to it, two must. It is disruptive as far as the Supreme Court is concerned, too, because it requires its direct review.

It is not as easy for it to handle such cases as a case which comes up on a petition for certiorari to the court of appeals through the usual process where it has the advantage of one review in the court of appeals. So the Supreme Court is burdened with it. And with the mushrooming of this in recent years it has become quite a burden to us.

The reason it was developed of course in the first instance was because it was thought officials of the United States and of the States would have a sense of outrage that one single district judge could enjoin their enforcement of statutes or a constitutional provision or regulation, and that it would become the courts more if three judges were required to exercise that power and there was reason for that thought at the time.

But as it worked out in practice, the great majority of the requests for the three-judge courts came from the plaintiff seeking injunctive relief. They don't come from the officials sought to be enjoined. They come from the plaintiffs.

Congress never thought there was reason to give them a right to request a three-judge court. As the statute reads, they have the right as well as the defendant and so these are where the requests come from. Now, I can't say that in a substantial portion of those cases if the

plaintiff didn't request them the defendant wouldn't have either. But in practice, the great majority of the requests that I get are from plaintiffs who seek injunctions.

Well Congress should decide, and I think it might, that there really is no reason for concerning itself with the sensitivities of an official of the United States with respect to an injunction by a single district judge with a right of review in the court of appeals and in the Supreme Court.

The only reason for the initial concern was with respect to the State official, sought to be enjoined, who justified what he does on the basis of the State statute or provision of the Constitution or regulation. And if it is left to a three-judge court there, it is to be set up on his request only and then his interest is protected completely.

I see no reason to retain the provision that a plaintiff seeking to enjoin a defendant out of concern about what the defendant might think has the right to request such a three-judge court because now we have the ridiculous situation that even orders of the ICC when they are sought to be reviewed, I have to convene a three-judge court to review that and this is just silly.

Senator BURDICK. Well, I think that view is correct. Not only are the rights of all parties protected, they have the right of review in the circuit court and the right to certiorari thereafter. As you say, a three-judge court ties up three judges.

Judge HAYNSWORTH. It certainly does.

Senator BURDICK. And this releases at least two of them to take care of other work. Now, I think this makes a lot of sense and as I go around to the district courts and meet with the judges, they seem to have a similar view on this. This is a reform that should be enacted.

Judge HAYNSWORTH. I know in the Judicial Conference of the U.S. Chief Circuit Judges meet together and either the day before or the day after each time it meets we have a chance then to talk about things of concern to us all. And we are greatly concerned about this three-judge court.

Senator BURDICK. I am too. After the decision on the constitutionality of a Federal statute, are there provisions in existing laws whereby the court of appeals can expedite the submission of the cases to it?

Judge HAYNSWORTH. If the proposals were adopted and a single district judge should enjoin an official of the United States from doing something on the grounds that the statute under which he acted was unconstitutional?

Senator BURDICK. Yes.

Judge HAYNSWORTH. Well, yes; it would have the same right to come to the court of appeals as any other case and I may say that in the fourth circuit we not only receive but we rather encourage suggestions to expedite appeals that should be expedited. With a suggestion like that either from a district judge or from counsel, we look at it, and, for instance, I received a request for expedition this summer in a case and I told the lawyer we'll hear you next Wednesday and he said well I wanted it expedited but I didn't expect that much expedition, I would like a little more time.

So we do expedite them. And if such an injunction were issued and it was a matter of importance, the district judge of course has a right to stay what he does pending appeal and most of the time he would do that. If he didn't, a judge of my court would have the right to

stay it pending appeal and then we would have the right and usually would expedite it.

Senator BURDICK. In other words, you don't think there would be any substantial difference in the time of expediting the cases whether they go the route of the three-judge court or whether they go the route of one judge?

Judge HAYNSWORTH. Mr. Chairman, I think if it were expedited in my court, it would get to the Supreme Court just about as fast as it gets there now. Of course you would have the first review much sooner than you now have it because it takes a long time for these to get to the Supreme Court on direct review from the three-judge court.

Senator BURDICK. Well, I think you have covered, as we say, the waterfront very well this morning and we certainly appreciate your testimony and I can conclude therefore, can I not, that you lend your full support to this bill?

Judge HAYNSWORTH. I do indeed and I am very grateful to you, sir, for your invitation for me to be here this morning. It has been a real pleasure, sir.

Senator BURDICK. Thank you for your contribution.

Judge HAYNSWORTH. Thank you, sir.

STATEMENT OF HON. JOSEPH S. LORD III, JUDGE, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Senator BURDICK. Our next witness will be Hon. Joseph S. Lord III, U.S. District Court judge for the Eastern District of Pennsylvania.

Judge Lord also has an impressive record.

He is a graduate of the University of Pennsylvania Law School. He was in private practice in Philadelphia from 1937 to 1961 with the exception of naval service during World War II.

He served briefly as U.S. attorney for the Eastern District of Pennsylvania and was appointed a district judge for the Eastern District of Pennsylvania in 1961.

Judge Lord is a member of the Order of the Coif and a member of the American Law Institute. He served on the advisory committee of the institute which developed the draft legislation we are considering today.

Judge LORD. Well, I think first I ought to start out with an apology for being late in the transmission of my testimony and also the background data. I can only say that I was waiting for some figures to complete the composition of the testimony which I didn't receive until Monday of this week. Consequently that is what held them up.

That is the first thing I want to say and the second thing is to echo what Judge Haynsworth has said by thanking you for the privilege for being here. I think it might be somewhat helpful to the committee if I enlarged a little on my background at the risk of seeming to talk about myself.

When I first came to the bar, I was with a firm that represented largely defendants and I was a trial lawyer for that firm. Later on I formed a firm with some other lawyers which became largely a plaintiff's firm and I practiced for quite a length of time at that firm.

In both places I was in court pretty much every day and particularly in the latter years in the district court. The reason I say this is that I think that, as I said in the prepared testimony that I have submitted,

that any realistic appraisal of the validity of the ALI proposals is going to proceed I think on two bases or two possible bases: one, from the standpoint of a lawyer and the other from the standpoint of the courts. The lawyer unquestionably has a selfish interest in his non-advocacy of the diversity proposals in particular. Since the diversity proposals have the overall effect of contrasting diversity jurisdiction, it is going to be pretty much a matter of where you stand about what is going to be best for your client as to whether you favor or oppose those proposals and I am speaking now of the practicing lawyer.

I know that when I first came to the bar, the Federal court in our district was a very conservative court. It had no hesitancy in cutting verdicts. It was really a prodefendant court and the firm that I was in represented the Yellow Cab of Philadelphia, which was then a Delaware Corp., and since most of our cases were Philadelphia plaintiffs, we routinely removed them to the Federal court. This is nothing new. This was done in the *Mecom* case which I cited in the testimony that I prepared where the plaintiff would rather have been in the State court. He eventually had to appoint a resident of the State of Louisiana although the decedent was a resident of Oklahoma in order to defeat Federal jurisdiction.

Eventually in our district the Federal court became infinitely more liberal, in the sense of liberality of discovery. In those days once a plaintiff obtained a verdict, the court rarely if ever would reduce it. And the consequence was that the concept of manufactured jurisdiction was revived. Just as in the *Mecom* case there was manufactured nonjurisdiction in the Third Circuit and particularly in the eastern district there arose the concept of manufactured Federal jurisdiction.

I speak with some familiarity on that because the first and I think the leading case is the case of *Jaffe v. Philadelphia & Western Railroad Co.*, decided I think in 139 F. 2d., I think my citation is correct. And it may be of some interest to the committee to know that Elane Jaffe, who was the administratrix in that case of a Philadelphia decedent against a Pennsylvania corporation, was my secretary and she came from New Jersey. And fortunately she was my secretary and fortunately she came from New Jersey because we were able to get Federal jurisdiction.

Parenthetically, I might remark that we lost the case on the merits but that didn't deter us from seeking Federal jurisdiction in every case in which we possibly could. As Judge Haynsworth has said, the concept of manufactured jurisdiction is being somewhat put at rest by the judiciary.

I think first in *McSparran v. Weist*, in the Third Circuit, and then later on in the Fourth Circuit, in which it was held of course that where the administrator, or the personal representative rather, was appointed for the sole purpose of obtaining jurisdiction, that that was collusive jurisdiction and conferred no jurisdiction on the district court. Interestingly enough, in a parallel to the *Jaffe* case, a case called *Fallat v. Gouran* which I haven't cited in my brief, where manufactured diversity was established I argued that case before the third circuit and Judge Harlan, later Justice, was sitting on that panel by designation and he agreed that manufactured jurisdiction was perfectly proper as long as it was the real party in interest under State law.

I think that what Judge Haynsworth has said about manufactured jurisdiction has tremendous force. And that the test now under the judicial restrictions of manufactured jurisdiction is one of good faith and one of whether or not the administrator or the personal representative was appointed solely for the purpose of obtaining Federal jurisdiction.

This necessitates a factual inquiry in all cases. And a factual inquiry has all of the infirmities of any factual inquiry.

Senator BURDICK. And it is time consuming.

Judge LORD. And time consuming. That was one of the infirmities I had in mind. It is time consuming and some of the other infirmities of a jurisdictional question are, for instance, the credibility of the witnesses, and even in some cases the availability of the witnesses. I think the ALI proposal does a great service in eliminating the need for that factual determination and I think that 1301(b)(4), providing that the citizenship of the administrator or the personal representative shall be deemed to be the same as that of the injured party or the decedent, I think it goes a great deal toward eliminating uncertainties.

It goes without saying that in any factual inquiry where the judge is the fact finder, his philosophical background is going to influence his factfinding and questions of jurisdiction. I respectfully submit to this committee they should not depend on that. They should depend upon an additional rule of law as proposed by section 1301(b)(4).

And one of the most important of the jurisdictional proposals as far as diversity is concerned, it seems to me, that the in-State plaintiff provision is of critical importance. I say that as the former employer of *Jaffe v. Philadelphia & Western Railroad Co.* I know I would have thrown up my hands in horror 10 years ago had I been confronted with any such proposal as this.

Again, it illustrates the fact of the difference of approach between a practicing lawyer and a judge. Today I heartily approve of it. So I do believe that this opposition is based on selfish practical considerations. I know that this committee has received from the Administrative Office much the same figures that I have, and a review of those figures indicates that a great bulk of the work at the district court and also the court of appeals level is composed of diversity cases.

In the Eastern District of Pennsylvania it runs, I think, somewhere between 49 percent and 55 percent of the total number of civil cases that have been started and which are pending. As of September 15, 1971, I believe the figure was that 49 percent of the diversity cases are cases involving in-State plaintiffs. And this is not an atypical figure because I took some figures at random from those that I got from the Administrative Office and I found, for example, in Massachusetts, in the District of Massachusetts for 1970, 66 percent of their diversity cases involved in-State plaintiffs.

Senator BURDICK. Were you able to ascertain in your statistics how many of those cases were actually tried?

Judge LORD. No, sir; I did not go into that area at all. I am sure that those figures could be obtained from the Administrative Office. I simply didn't have them. I don't have them because I did not ask for them. But whether they were tried or not, Senator Burdick, they are terribly time consuming on the district court judges in the sense of motions for discovery, and all sorts of pretrial motions, pretrial

conferences, all of which are extremely time consuming at the district court level even more than at the court of appeals level.

And there is just simply no question in my mind that there is absolutely no justification either historically or factually at the present time for giving the in-State plaintiff the opportunity of invoking Federal jurisdiction.

Actually, going back to the Federalist, which I haven't cited in my testimony but which I did reread before coming down here, the only historical basis for diversity jurisdiction was the idea of providing an unbiased national forum for the foreigner, for the Vermonter who was forced to sue a Georgia citizen in Georgia. The theory was, of course, that the Vermonter would get an unbiased trial in a national forum whereas perhaps he would not in a State forum.

Even if that concept has any validity today, and I seriously doubt it, but even if it does, it certainly has no bearing or no relationship whatsoever to the Pennsylvania resident who sues a New Jersey citizen by means of a long-arm statute and who comes into the Federal court of the eastern district of Pennsylvania. There just is no justification for his saying that I need a Federal court rather than a court of common pleas in Philadelphia where I live to obtain unbiased jurisdiction.

I suggest that here again the approach depends to a certain extent on your philosophy. Judge J. Skelly Wright of the District of Columbia has said that if the tools are there, if Federal justice is better than State justice, it ought to be adopted even though it was a concept that was not contemplated by the framers of the Constitution and the Members of the First Congress of 1789.

Personally, I disagree with that, much as I admire Judge Wright, much as I admire his intellectual prowess; it seems to me that it does not behoove the Federal system to take upon itself the idea of providing a better quality of administration of justice simply because the States either won't or can't do it. It seems to me that the answer to that lies not in the Federal courts but rather in the improvement in the State courts of their judicial machinery if indeed there is such a deficiency.

It is not unlike the concept I heard Mr. Justice Brennan voice after the trilogy of *Fay v. Noia*, *Gideon v. Wainwright*, and *Townsend v. Sain* when he said:

I know I am imposing a lot of work on you judges but the idea really is to have the State courts improve their constitutional machinery so that there won't be these problems, so that these problems won't arise.

Senator BURDICK. What you are saying is the dual system should be actually dual in quality and quantity?

Judge LORD. Yes, sir; exactly so, and I hope you will excuse me for taking so long but I am concerned with this.

Senator BURDICK. I can see that you are quite an advocate of this approach.

Judge LORD. Yes, sir. I am indeed. I am in favor of it and I would like to say one other thing if I may. This is a large package which has been presented. If the package is legislated including the admiralty provisions, the three-judge court provisions and all of the other provisions contained in it, the Federal question provision, it is going to take a long time I think and I would most respectfully suggest and urge that if this committee feels well toward the diversity proposals

and if this committee feels it can recommend the approval of the diversity provisions, there is a crying need for those now and if possible, the diversity provisions of necessity may well be submitted to the legislature separately and apart from the package for immediate adoption, again, assuming the approval of this committee and the Senate.

I know I have many more things I would like to say and I am again aware that this committee would not like me to go on and say them, but I thank you very much for the privilege of being here and for speaking out as I have so strongly done in favor of the proposal.

Senator BURDICK. Well, I certainly thank you for your contribution and your entire statement of course will be made a part of the record without objection.

(The statement of Judge Joseph S. Lord III follows:)

STATEMENT OF HON. JOSEPH S. LORD III, JUDGE, U.S. DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Mr. Chairman, Members of the Committee: There are two approaches in evaluating the proposed A.L.I. changes in diversity jurisdiction: (1) from the standpoint of the advocate and his client; (2) from the standpoint of the court. There is no doubt in my mind that the position a given lawyer takes as to the proposals is largely, if not entirely, motivated by the pragmatic approach of "where will my clientele fare better." This is not said with any invidious overtones, but on the contrary in light of the simple truth that any lawyer is duty bound to do his best for his client. When I first came to the bar, the firm for which I worked represented the Yellow Cab Co. of Philadelphia, then a Delaware corporation. Since most actions against it were by Pennsylvania citizens, they were routinely transferred to the U.S. District Court for the Eastern District of Pennsylvania, then a very conservative court. As the impact and liberality of the New Deal began to be felt, federal judges became more liberal, verdicts for plaintiffs were larger, and motions for new trials for excessiveness were routinely denied. Not so in the state courts. And so, the Cab Company became a Pennsylvania corporation, there was usually no diversity and plaintiffs were relegated to the state courts.

In *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931), a man named Smith was killed, allegedly as a result of defendant's negligence. His widow, from Oklahoma, was appointed administratrix. She started suit in the Oklahoma state court and defendant, a Louisiana corporation, removed the case to the federal court. After an unsuccessful motion to remand, the widow discontinued the suit, resigned as administratrix, appointed Mecom, a Louisiana citizen, as administrator and again brought suit in the state court. Again, defendant removed and again, plaintiff's motion to remand was unsuccessful. After losing the case in the lower federal courts, plaintiff ultimately appealed to the Supreme Court. That Court held that the widow had a perfect right to extricate herself from federal jurisdiction if her interests would better be served in the state courts.

On the other side of the coin, where a plaintiff thought that a federal forum was a more favorable climate for plaintiff's case, a New Jersey citizen was appointed as administratrix for a Pennsylvania decedent in a suit against a Pennsylvania corporation. *Jaffe, Adm'x. v. Phila. & Western Ry. Co.*, 139 F.2d 1010 (C.A. 3, 1950); *Corabi v. Auto Racing, Inc.*, 264 F.2d 784 (C.A. 3, 1959).

It seems pretty plain, then, that whether one favors or opposes federal jurisdiction depends on whose ox is being gored. In *McSparran v. Weist*, 402 F.2d 867 (1968), the Third Circuit, which had sustained jurisdiction in *Jaffe* and *Corabi*, held that the appointment of a non-resident fiduciary for the sole purpose of creating federal jurisdiction was collusive in violation of 28 U.S.C.A. § 1359, and gave no jurisdiction to the district court. Section 1301(b)(4) not only codifies the result of *McSparran*, but eliminates the good faith test and makes manufactured diversity unavailable to defeat, as well as to create diversity.

Faced as we are with practical and, from the advocate's standpoint, persuasive arguments on both sides, it may be well to look at the problem from the viewpoint of the court. There is no doubt that a contraction of diversity jurisdiction will result in a lessening of the occasions on which a federal court will be called upon to decide questions of state law of first impression which ought to be decided by the state courts. This, though, is either a theoretical or a philosophical consideration.

On the practical side, from the court's viewpoint, is the impact of diversity cases on the court's function. The federal system, I submit, was never intended to be used as a magistrates' courts for the resolution of small claims. There have been arguments that full and unrestricted diversity should be retained because the quality of the administration of justice generally is better there than in the state courts. See AM. L. INST. PROC. 72 (1963). If this is so, it is in my judgment due in large part to the caliber of lawyers who will give up a substantial practice for the federal bench who would not make such a sacrifice for the state bench. But certainly, this should not be demanded when the major portion of the judicial work consists of presiding over unimportant and many times piddling personal injury claims. More importantly, though, it seems that the remedy for any such supposed deficiency or inequality lies not in the perpetuation of the myth that mere diversity demands a federal forum, but rather in the correction and improvement by the states in their own judicial systems.

A great deal has been, and can be said of the philosophical and theoretical considerations favoring the contraction of diversity jurisdiction: the notion that federal courts should not in the first instance decide novel questions of state law; that an in-state resident does not require a federal court to obtain unbiased justice; and that judicial quality is equally a matter of state concern as of federal concern. I do not dwell on these considerations, but turn rather to the practical concerns of the court.

It is beyond doubt that in recent years, the non-diversity case load of the federal courts has vastly increased. Civil rights cases, both under Section 1983 and the Civil Rights Act of 1964, Selective Service cases, and habeas corpus cases, to mention only a few areas, have greatly expanded the scope of the courts' business. By the same token, diversity cases, for which federal jurisdiction has only historical justification, have not diminished. As of September 15, 1971 in the Eastern District of Pennsylvania there was a total of 5,439 civil actions pending, including habeas corpus cases. Of these, 2,682 or about 49.4%, were diversity cases. And of these, 1,471 cases, over 50%—were cases where a Pennsylvania resident was the plaintiff. To put it another way, approximately 27% of the total civil case load of the Eastern District of Pennsylvania, as of September 15, 1971, was composed of diversity cases for which a federal forum cannot conceivably be justified either philosophically or historically. When there is added to that figure the commuter cases covered by Section 1302(c), it seems obvious that the adoption of this proposed legislation would substantially increase court time available for disposition of cases that are rightfully and inescapably in the federal courts.

I realize, of course, that the figures I have quoted relate only to a single district. However, the figures which this Committee already has from the Administrative Office seem to demonstrate that our District is not atypical. For example, in 1970 the District of Massachusetts had 336 diversity cases, of which 66% were brought by in-state plaintiffs. Over the country at large, in the year 1970, there were 22,854 diversity cases, involving 12,200, or over 53% in-state plaintiffs.

These figures, incomplete though they may be, are not selective, but random. It seems to me that they fairly represent an index of what A.L.I. proposes in the most important area of its diversity proposal, Section 1302(a). It also seems to me that they present a dramatic portrayal of what the adoption of the proposal would mean practically to the federal system. I hasten to add that my advocacy of this proposal is motivated in no way by any climerical desire for more leisure and less work. On the contrary, it is with the knowledge that there is no basis in reality for continued federal jurisdiction in this area and that its removal would free us, as judges, to devote more time to those matters which truly belong to us.

I take the liberty of adding one final, but to me extremely important observation. The Institute's proposals were developed over an eight year period. They cover the whole gamut of state-federal jurisdiction, including admiralty, federal question, removal, three-judge court and suits in which the United States is a party. It would be unrealistic to expect swift passage by the Legislature of any such massive package. However, of all the proposals contained in the Study,

I believe that the most important, and the ones that will work the greatest immediate good are the diversity proposals. I sincerely believe that the present situation cries out for remedy. I most respectfully urge, then, if this Committee approves, that Sections 1301 to 1307 be submitted separately for immediate adoption. If this were to be done, it would relieve at once what is probably the most sorely vexing problem confronting the federal courts today.

I am deeply grateful to the Committee for giving me the rare privilege and opportunity to express my views.

Senator BURDICK. I note your suggestion how we should handle this but the fact remains that we have had very little objection to the other sections. The diversity provision seems to have the most controversy.

Judge LORD. Well, of course. I can understand that.

Senator BURDICK. Well, that will be considered. As we go along, we are going to hear the opposition and we'll see how this develops and you can be sure that this committee is going to give it full attention because I am convinced that we have to do something along these lines if not on all of the proposals the ALI submitted.

Just one or two more questions. Judge Lord, you were a member of the ALI advisory committee, do you feel that this committee had adequate representation of the members with trial experience?

You yourself had considerable trial experience. Do you strongly endorse these proposals? Do you feel that they adequately insured an even level of justice at every level by providing of the diversity jurisdiction for genuine outsiders?

Judge LORD. I am sorry. I didn't hear that.

Senator BURDICK. Do you feel they adequately insured, in these proposals, an even level of justice by providing diversity jurisdiction for genuine outsiders, for the genuine diversity?

Judge LORD. Yes, sir. I have no hesitancy in saying that they do.

Senator BURDICK. Proceed.

Judge LORD. I have serious doubts as to the real need for diversity jurisdiction to insure a fair tribunal. I must say that I base that on personal experience. I have tried cases myself in the State courts in the South, coming down with my unmistakable Philadelphia accent and I have received absolutely magnificent treatment in the State courts in the South.

So I really have some doubt as to the real need for diversity jurisdiction except in the multi-party situations which Judge Haynsworth referred to. But I equally have no doubt at all that the ALI proposals are moderate and that they provide full protection for the outside plaintiff.

Senator BURDICK. What about the first part of the question? Do you think the trial lawyer segment had adequate representation in the discussion of these matters?

Judge LORD. No, sir, I do not. Not at the advisory committee level. I think that when I went on the panel, which I think was in 1962 or 1963, that I was recently enough away from the trial practice that I may almost have still have been an advocate, a hat which I gladly shed.

I do not think that there were enough advocates on the panel. However, I think it is very important to note that all of these proposals were fully considered, not at one but at several of the annual meetings of the American Law Institute where every lawyer, every trial lawyer, both plaintiff's lawyers and defendants lawyers, and corporation lawyers had the opportunity to speak on these proposals. The in-State plaintiff and the diversity proposals were finally adopted in 1965, which is now 6 years ago and so there certainly was adequate representation.

Senator BURDICK. As Professor Wechsler outlined, there were several private practitioners on this Advisory Panel, this Council.

Judge LORD. Yes, sir. There were some added: Mr. Buchanan from Pittsburgh, Mr. Warner from the District of Columbia, and there were others that were added. Their voices, if I may say, certainly were loud in the deliberations of the committee but I still don't think there was adequate representation. I must say that very frankly.

However, I must also say I don't think it detracted a whit from the validity of the proposals.

Senator BURDICK. Judge Lord, you have spoken to some of the restrictions in the proposed diversity jurisdiction. Are you in agreement with section 1304(b) which allows removal by one defendant even when there is not complete diversity in order to protect his interest? This is where the defendants have different residences.

Judge LORD. Yes, I am, because I don't see that the invocation of Federal jurisdiction could possibly hurt the other defendant and I think on the balance that it is better to have the diversity defendant able to remove if he feels that he needs a Federal forum for an unbiased disposition of his case.

Senator BURDICK. Do you agree with the other provision of expanding diversity jurisdiction along the principal lines? I presume we are thinking about multi-State and multi-party situations.

Judge LORD. Well, here again I must try to approach that objectively. Were I to approach it as an advocate, I would say in the words of one jurist who was very closely related to me, I have never shunned work but I have never eagerly sought it out.

Were I to advocate the expansion of diversity jurisdiction, I would be seeking out work. Nevertheless, I do advocate it. I think that the proposals are absolutely necessary.

Senator BURDICK. I believe the staff has one or two questions.

Mr. MULLEN. Well, Judge Lord, you mentioned you wanted to address yourself to part of the admiralty jurisdiction, section 1319. Could you give us your views on that?

Judge LORD. Yes, I had some thoughts about the admiralty jurisdiction which provides for a jury trial in the case of admiralty cases where damages for personal injury or death are sought. At the present time in a number of districts in the United States, including the Eastern District of Pennsylvania, and the Eastern District of New York, and the Southern District of New York and I think the Eastern District of Louisiana, some of the districts on the West Coast suffer from clogged dockets because of the influx of longshoremen cases. The longshoremen now come into the district courts on diversity jurisdiction. That is the only way they get there and get a jury trial.

If they wanted a jury trial and didn't have diversity jurisdiction, they would have to go to the State courts. Of course, they can still come in but they will not get a jury trial.

I think my approach, and I must confess this frankly, that my approach to the provision for a jury trial in admiralty cases where damages for death or personal injury are sought is a selfish one. I think it is one which would look to the reduction of the dockets in my own district.

I am now convinced that my selfish approach is not a valid one. I can see no reason now, although I opposed it at that time of the advisory committee meetings when it was adopted, and I will add I was joined in that opposition by Judge Maris, but although I opposed it I believe now rationally and conscientiously that there is no basis for opposing it.

I would like to see our dockets cleared, but I can not find a rational basis for saying it should be out.

Senator BURDICK. Well, you again have made a great contribution to this legislation before us and I appreciate your coming here and taking the time to present your comments.

We are very grateful for your appearance this morning.

The committee will be adjourned.

(Whereupon, at 11 a.m., the hearing was concluded.)

THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS

TUESDAY, OCTOBER 5, 1971

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN
JUDICIAL MACHINERY OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 3110, New Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senator Burdick.

Also present: William P. Westphal, chief counsel; Michael J. Mullen, assistant counsel.

Senator BURDICK. Our first witness this morning will be Prof. J. W. Moore of the School of Law, Yale University and he has a long, impressive background here, and without objection the review of the same will be made a part of the record at this time.

(The document referred to follows:)

BIOGRAPHY OF JAMES WILLIAM MOORE

Born.—Condon, Oregon, September 22, 1905; parents: Amos John and Alice Lulu (Amend) M.; wife: Etta Eugenia Gracey; children: William Eugene, Valerie Ann.

Residence.—28 Laurel Road, Hamden, Connecticut.

Education.—B.S. Montana State College 1924; J.D. University of Chicago, 1933, J.S.D., Yale, 1935.; LL. D. (Hon.) Montana State College 1962.

Employment.—Chief dep. clerk of Montana District Court, 9th Jud. Dist., 1925–31; instr. in law, Yale, 1935; asst. professor of law, University of Chicago, 1936–1938; associate professor of law, Yale, 1938, 1941; distinguished visiting professor of law, University of Texas, 1941–42, University of Minnesota, 1956; professor of law, Yale, 1943—, now Sterling Professor of law. Co-reporter in 1937 to the International Academy of Comparative Law, The Hague; special research assistant to Supreme Court's Advisory Committee on Federal Civil Rules, 1935–38, 1943; member of the United States Supreme Court's Advisory Committee on Federal Rules, 1954–56; cons. revision of federal Judicial Code, 1944–48; member of United States Supreme Court's Committee on Rules of Practice and Procedure, 1960—; of counsel for the State of Texas in Texas "Tidelands" oil litigation, United States vs. Texas, Counsel to Trustees of New Haven Railroad in Reorganization.

Member.—American Bar Association (past chairman of the standing committee on jurisprudence and law reform; member of committee on reorganizations), Montana Bar Association, American Judicature Society, Sigma Chi.

Editor.—Gilbert's Collier on Bankruptcy, 1937.

Author.—Moore's Federal Practice, 3 vols., 1938, 2d edit., 14 vols., 1948–67; Moore's Bankruptcy Manual, 1939; Moore's Commentary on the U.S. Judicial Code, 1949; Moore's Collier on Bankruptcy, 9 vols., 1940, 1941, 1942, 1943, 1944; Moore's Federal Practice Forms, 1 vol., 1943; Corporate Reorganization Cases and Materials, 1946; Law in International Year Book, 1945–49, 51, 52; Moore and Oglebay Corporate Reorganization 2 vols., 1948; Moore and Coun-

tryman, Debtors' and Creditors' Rights—Cases and Materials, 1951; Moore's Debtors' and Creditors' Rights, 1955; Moore and Phillips Debtors' and Creditors' Rights, 1966; Moore's Federal Practice, Rules and Official Forms (1961), (1963), (1966); Moore and Vestal, Moore's Manual (1962); articles in legal publications.

Senator BURDICK. It is a pleasure to have you with us this morning, Professor. You may proceed in any order you wish.

STATEMENT OF PROF. JAMES WM. MOORE, SCHOOL OF LAW, YALE UNIVERSITY

Mr. MOORE. Mr. Chairman, gentlemen, I apologize for the long biography. My secretary was instructed to cut it down, but somehow or other she just picked out one from the old file, so I ask you not to hold that voluminous thing against me.

I appreciate the courtesy of the chairman in inviting me to comment on pending S. 1876, and I commend the chairman for his objectivity, stated at the time he introduced the bill. "It is my hope," you said, that "the introduction of the act will bring about a spirited and rigorous dialogue on every aspect of the bill." Perhaps I can at least add spirit.

Since this bill is the product of the American Law Institute, at times I shall refer to it as the ALI bill. Naturally, I approach this bill with a certain humility since it bears the hallmark of the ALI, albeit not a hallmark approved by all members of the Institute.

I am convinced, however, that on the whole the bill is unsound and will do far more harm than good. This conviction partially stems from over 35 years of teaching, writing, and consultation with lawyers in the area of Federal judicial administration.

I say "on the whole the bill is unsound" for, of course, it does have good features. Yet some features that may have been good in the drafting stage are possibly obsolete.

Time, for example, has probably passed some by, as the provision dealing with three-judge courts. But since I am advised that this hearing is on the subject of diversity, I shall confine my remarks primarily to that subject.

My main objections to the bill are three: (1) the bill is unnecessarily technical, whereas procedural and jurisdictional principles should be simple; (2) its underlying philosophy as to federalism is erroneous; (3) it unwarrantedly emasculates diversity jurisdiction.

In addition to my comment that follows, which I should like to keep brief, I respectfully ask that these comments be supplemented by an article on diversity which Professor Weckstein and I authored, and which we tender for the record.

Senator BURDICK. Your work will be made a part of the file, without objection. (Mr. Moore's prepared statement follows. The article appears in the appendix at p. 410.)

STATEMENT OF PROF. JAMES WM. MOORE

I appreciate the courtesy of the Chairman and the Members of the Subcommittee in inviting me to comment on pending S. 1876. And I commend the Chairman for his objectivity, stated at the time he introduced the bill. "It is my hope," you said, that "the introduction of the act will bring about a spirited and rigorous dialog on every aspect of the bill." Perhaps I can at least add spirit.

Since this bill is the product of the American Law Institute, at times I shall refer to it as the A.L.I. bill. Naturally I approach this bill with a certain humility since it bears the hallmark of the A.L.I., albeit not a hallmark approved by all members of the Institute. I am convinced, however, that on the whole the bill is unsound and will do far more harm than good. This conviction partially stems from over 35 years of teaching, writing, and consultation with lawyers in the area of federal judicial administration. I say "on the whole the bill is unsound" for, of course, it does have good features. Yet some features that may have been good in the drafting stage are possibly obsolete. Time, for example, has probably passed some by, as the provision dealing with three judge courts. But since I am advised that this hearing is on the subject of diversity I shall confine my remarks primarily to that subject.

My main objections to the bill are three: (1) the bill is unnecessarily technical, whereas procedural and jurisdictional principles should be simple; (2) its underlying philosophy as to federalism is erroneous; (3) it unwarrantedly emasculates diversity jurisdiction.

In addition to my comment that follows, which I should like to keep brief, I respectfully ask that these comments be supplemented by two articles on diversity which Professor Weckstein and I authored,¹ and which we tender for the record. (1) *Courts exist for the litigants; procedural and jurisdictional principles should be simple.*

When the Federal Civil Rules were before Congress in 1938, Attorney General Cummings stated in support of them:

"But the courts do not exist for the lawyers; they do not exist for the judges. They exist for litigants, and litigants are entitled to the best possible procedure that human ingenuity can render. The courts are established to administer justice, and you cannot have justice if justice is constantly being thwarted and turned aside or delayed by a labyrinth of technical entanglements."²

The Civil Rules reduce technicality to a minimum and provide flexibility in their applicability. As a consequence these Rules produced a modern workable civil procedure for the United States District Courts; and have served as a model for procedural improvements in most of the states of the Union. Jurisdiction and related statutes should approach their subject in the same spirit. On the contrary, S. 1876 turns the questions of federal jurisdiction and venue into: "a labyrinth of technical entanglements". Let me illustrate. As an additional limitation upon diversity where a corporation is a plaintiff or defendant § 1302 adds the qualification of "local establishment." This is not a term of art; and its meaning will be endlessly disputed in attempts to expound "local establishment", and to distinguish it from dealings carried on through an independent commission agent, broker, or custodian. And in apply-the-limitation of "local establishment" it will also be necessary to determine whether the action arose out of the activities of that establishment.

Section 1305 affords another illustration. This section deals with a change of venue to a more convenient forum on motion of the defendant. Subsection (a) thereof starts out with great promise. It provides: "For the convenience of the parties and witnesses or otherwise in the interest of justice" a district court may on defendant's motion transfer the case to any other district. However, at this point subsection (b)(1) intrudes so that the action may not be transferred to a district where "one or more plaintiffs and all moving defendants would be barred under section 1302 of this title from invoking federal jurisdiction". At this point of time in the litigation we should be interested in getting on with the trial in a convenient forum to the end that the case may be adjudicated on the merits. But an entangling concept of jurisdiction precludes the convenient transfer. And "if the court finds that there is no other place in which trial would be appropriate," it is to stay the proceedings on certain conditions in favor of a new action in an appropriate state court. This is adjudication by postponement. And for what, I ask?

Section 1301(e) is further illustrative. It provides that where there is diversity jurisdiction between plaintiff A and defendant B, this jurisdiction will support an additional claim by a member of A's family living in the same household as A, where his claim arises out of the transaction or occurrence that is the subject matter of the action. Immediately petty little questions arise, which should be irrelevant; but become important and relevant because these petty matters are made jurisdictional. Is A's nephew living with A while going to school a member

¹ *Diversity Jurisdiction: Past, Present, and Future*, (1964) 43 Tex. L. Rev. 1; *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, (1964) 77 Harv. L. Rev. 1426.

² 6 Moore's Federal Practice (2d ed) §54.43[4].

of A's family? Does it make any difference whether the nephew is a minor or an adult or who pays for his board and lodging? Lawyers can be expected to exploit such matters. To my mind there is, however, a more fundamental objection. Why should the federal court's jurisdiction turn on the accident of family relationship? If there is jurisdiction of A's claim against B then any other person who could join with A or be joined as a defendant under the Civil Rules should be allowed to do so. Thus suppose that A and a number of persons are injured in a bus accident. If there is jurisdiction of A's claim against the bus company then it makes practical sense to allow the other claimants against the bus company to join with A, if they see fit, whether or not anyone is a member of A's family. This proposal is an example of the salutary operation of a very simple principle that I have long advocated, that of minimal diversity.

Chapter 160 deals with necessary parties dispersed in different jurisdictions. It aims in the right direction, but instead of attempting a definition of who is necessary for a just adjudication the reference should be to Civil Rule 19, which deals with that matter. Parallel definitions will only cause confusion. But more importantly subsection (a) of § 2371 limits its use where all of the necessary parties are not amenable to process of any one territorial jurisdiction. At times this will result in interminable haggling as to whether there is such a territorial jurisdiction, when at least, for example, if the federal case has substantially progressed the court should have the power to authorize process to be served on a non-joined necessary party and proceed with the trial on the merits.

These examples are not exhaustive. This bill does not strive for simplicity. Quite the contrary. Impractical limitations and qualifications are made, presumably to satisfy some preconceived theories of federalism. Yet even now federal courts are obliged to spend too much time on jurisdictional objections, with a resulting waste of time and increased expense. The process demeans the courts and the profession. Instead of adding qualifications and limitations to diversity jurisdiction, which will chiefly benefit legal commentators such as myself, the thrust should be exactly in the opposite direction for the benefit of the litigants.

(2) Diversity jurisdiction is a proper part of federalism.

This bill maims, although it does not completely destroy diversity, because of an abstract theory of federalism. And, with deference, the A.L.I.'s theory of federalism is wrong.

As you know, Sec. 2 of Article III of the Constitution is the basic blueprint of federal judicial power. Let me read the first paragraph of Sec. 2; and I respectfully ask you to note the categories of federal judicial power that depend upon the status of a party or parties:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The Constitution's principles of federalism as perceived by the First Congress were invoked in the Judiciary Act of 1789. This Act initially implemented the Constitution's inclusion of diversity within the federal judicial power; and the federal courts have had and have exercised diversity jurisdiction every since. Although specific grants of other types of jurisdiction were made by Congress to the circuit courts from time to time, such as grants over patent infringement, and suits under the postal laws, diversity jurisdiction over actions at law and suits in equity supplied most of the civil grist for the circuit courts until well toward the end of the last century. It was this jurisdiction which brought our Nation's courts to the people; and its application was a great cohesive force in our country. That force has not spent itself.

Irrespective of what belief or beliefs caused the founding fathers to include diversity jurisdiction in the constitutional grant, the basic question today is: does diversity jurisdiction serve a useful purpose. If it does it should be retained, indeed expanded if warranted.

I do not come to demean state courts. They are good courts. The brightest hours in our judicial history are those when the state and federal courts have worked harmoniously in deciding both state and federal matters. There are many times then state and federal matters are intertwined. Let me discuss a field in which

I have had both theoretical and practical experience—bankruptcy and reorganization. As counsel for the Trustee in the reorganization of the New Haven Railroad for over 10 years I have found that often state and federal law cannot be compartmentalized. The allowance and disallowance of claims have usually depended upon principles of state law, but not always. An objection that the claimant has received a voidable preference or fraudulent transfer will often turn on both state and federal law; and its priority status may similarly intertwine state and federal law, although the latter will usually predominate. What constitutes a preference under § 60 will usually depend in part upon state law, for example, as to when the transfer was made. The trustee will usually be invoking state law under both § 70c, the strong-arm clause, and § 70e. Whether the claimant has a statutory lien, recognizable under § 67b, is more apt to involve state law but at times federal law may be controlling. The voidability of judicial liens under § 67c, will often involve both state and federal law. In a federal Nation such as ours, compartmentalization is often non-existent. And, jurisdictionally, the Bankruptcy Act utilizes principles of diversity in § 23; and concurrent use of both state and federal courts in avoiding preferences and fraudulent transfers. §§ 60b; 67c, 70e(3).

Realistic federalism uses both state and federal courts when concurrent jurisdiction serves a useful purpose.

And the A.L.I. seems grudgingly to recognize this principle partially. Thus the A.L.I. trims its sails in its general approach to federalism in Sections 1301, 1302, and 1307; and in its more specific approach to interpleader, see Sections 2361 and 2375, and in cases involving dispersed necessary parties, see Sections 2371, 2373, and 2375. According to the A.L.I. federalism includes, at least will tolerate, diversity when diversity serves what it conceives to be desirable. Indeed, it expands diversity in interpleader and in dispersed necessary party cases. Hence we pass on to the crucial question—whither diversity?

(3) *Diversity jurisdiction should be retained and simplified*

And so I return to one of my original premises—courts exist for litigants and the means for trying cases on the merits should not be lost in a labyrinth of technical entanglements.

So far as litigants are concerned it is my belief that they support diversity jurisdiction; indeed, would welcome a simplification of and a reasonable expansion of its principles to effect simplification. They are interested in cases being tried on the merits; and not a judicial statistic that merely represents a shift of a case from the federal docket to a state docket.

Federal jurisdiction or the competency of a federal court over a particular case is a concept invented by courts. It should be applied constructively and not destructively. Too often federal courts have made a fetish of federal jurisdiction so that even a party who invoked the federal court's jurisdiction is not estopped to raise lack of federal jurisdiction after a trial on the merits; and an appellate court will raise lack of federal jurisdiction in the trial court on its own motion. This should be stopped. And I endorse the thrust of § 1386, although I would substitute the transfer of a case to an appropriate state court, or vice versa, in lieu of the dismissal provided for by subsections (b) and (c). Transfer in lieu of dismissal would recognize the federal and state courts as working partners not alien courts. This principle of transfer should be applied to other appropriate situations. See, e.g., § 2373(b).

The principle of minimal diversity should be applied to all types of diversity cases—not merely to interpleader and dispersed necessary party cases. This would simplify the application of diversity tremendously, without an inordinate expansion for many non-federal claims are presently triable in federal courts due to principles of ancillary and pendent jurisdiction.

Corporate "citizenship" should be simplified; and certainly not be further technically entangled by the notion of a "local establishment" introduced by § 1302(b)(2). Similarly, the citizenship of a natural person should not be barnacled with a principal place of business or employment in a State qualification, as provided in § 1302(c).

The jurisdictional amount requirement now found in 28 U.S.C. §§ 1331 and 1332 and carried forward in proposed § 1301 and partially in § 1311 should be eliminated as a jurisdictional entanglement and shifted to the power of the federal court to assess costs and a reasonable attorney's fee to curtail bringing small claim cases in the federal court.

Venue in admiralty has always been fairly simple. And appropriate principles of simplicity should control in diversity cases.

Undoubtedly others can suggest further principles of simplification. Let us turn away from jurisdictional concepts that would delight Baron Parke, who loved procedural entanglements of all types. Let us make simplification of jurisdiction our goal. And let us keep the federal courts as working partners with state courts in the diversity area.

Mr. MOORE. Thank you.

I come now to my first point, that courts exist for the litigants and procedural and jurisdictional principles should be simple.

When the Federal civil rules were before Congress in 1938, Attorney General Cummings stated in support of them:

But the courts do not exist for the lawyers; they do not exist for the judges. They exist for litigants, and litigants are entitled to the best possible procedure that human ingenuity can render. The courts are established to administer justice, and you cannot have justice if justice is constantly being thwarted and turned aside or delayed by a labyrinth of technical entanglements.

The civil rules reduce technicality to a minimum and provide flexibility in their applicability. As a consequence, these rules produced a modern workable civil procedure for the U.S. district courts and have served as a model for procedural improvements in most of the States of the Union. Jurisdiction and related statutes should approach their subject in the same spirit.

On the contrary, S. 1876 turns the questions of Federal jurisdiction and venue into "a labyrinth of technical entanglements." Let me illustrate.

As an additional limitation upon diversity where a corporation is a plaintiff or defendant, section 1302 adds the qualification of "local establishment." This is not a term of art; and its meaning will be endlessly disputed in attempts to expound "local establishment," and to distinguish it from dealings carried on through an independent commission agent, broker, or custodian. And in applying the limitation of "local establishment," it will also be necessary to determine whether the action arose out of the activities of that establishment.

Section 1305 affords another illustration. This section deals with a change of venue to a more convenient forum on motion of the defendant. Subsection (a) thereof starts out with great promise. It provides: "For the convenience of the parties and witnesses or otherwise in the interest of justice" a district court may, on defendant's motion, transfer the case to any other district.

However, at this point, subsection (b)(1) intrudes so that the action may not be transferred to a district where "one or more plaintiffs and all moving defendants would be barred under section 1302 of this title from invoking Federal jurisdiction." At this point of time in the litigation, we should be interested in getting on with the trial in a convenient forum to the end that the case may be adjudicated on the merits.

But an entangling concept of jurisdiction precludes the convenient transfer, which is merely a housekeeping device to try the case in a convenient place.

And "if the court finds that there is no other place in which trial would be appropriate," it is to stay the proceedings on certain conditions in favor of a new action in an appropriate State court.

This is adjudication by postponement. And for what, I ask?

Section 1301 (e) is further illustrative. It provides that where there is diversity jurisdiction between plaintiff A and defendant B, this jurisdiction will support an additional claim by a member of A's

family living in the same household as A, where his claim arises out of the transaction or occurrence that is the subject matter of the action. Here the bill enlarges diversity.

Immediately, petty little questions arise, which should be irrelevant; but become important and relevant because these petty matters are made jurisdictional.

Is A's nephew, living with A while going to school, a member of A's family? Does it make any difference whether the nephew is a minor or an adult or who pays for his board and lodging?

Lawyers can be expected to exploit such matters. To my mind there is, however, a more fundamental objection. Why should the Federal court's jurisdiction turn on the accident of family relationship?

If there is jurisdiction of A's claim against the bus company, then it makes practical sense to allow the other claimants against the bus company to join with A, if they see fit, whether or not anyone is a member of A's family. This proposal is an example of the salutary operation of a very simple principle that I have long advocated, that of minimal diversity.

Chapter 160 deals with necessary parties dispersed in different jurisdictions. It aims in the right direction, but instead of attempting a definition of who is necessary for a just adjudication, the reference should be to Civil Rule 19, which deals with that matter.

Parallel definitions will only cause confusion.

But more importantly, subsection (a) of Section 2371 limits its use where all of the necessary parties are not amenable to process of any one territorial jurisdiction. At times, this will result in interminable haggling as to whether there is such a territorial jurisdiction, when at least, for example, if the Federal case has substantially progressed, the court should have the power to authorize process to be served on a non-joined necessary party and proceed with the trial on the merits.

These examples are not exhaustive. This bill does not strive for simplicity. Quite the contrary. Impractical limitations and qualifications are made, presumably to satisfy some preconceived theories of federalism.

Yet even now, Federal courts are obliged to spend too much time on jurisdictional objections, with a resulting waste of time and increased expense. The process demeans the courts and the profession. Instead of adding qualifications and limitations to diversity jurisdiction, which will chiefly benefit legal commentators such as myself, the thrust should be exactly in the opposite direction for the benefit of the litigants.

I come now to my second point, that diversity jurisdiction is a proper part of federalism. This bill maims, although it does not completely destroy diversity, because of an abstract theory of federalism. And, with deference, the ALI's theory of federalism is wrong.

As you know, section 2 of article III of the Constitution is the basic blueprint of Federal judicial power. Let me read the first paragraph of section 2, and I respectfully ask you to note the categories of Federal judicial power that depend upon the status of a party or parties:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; and to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Case, of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another

State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a state, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Constitution's principles of federalism as perceived by the First Congress were invoked in the Judiciary Act of 1789. This act initially implemented the Constitution's inclusion of diversity within the Federal judicial power; and the Federal courts have had and have exercised diversity jurisdiction ever since.

Although specific grants of other types of jurisdiction were made by Congress to the circuit courts from time to time, such as grants over patent infringement, and suits under the postal laws, diversity jurisdiction over actions at law, and suits in equity supplied most of of the civil grist for the circuit courts until well toward the end of the last century.

It was this jurisdiction which brought our Nation's courts to the people; and its application was a great cohesive force in our country. That force has not spent itself.

Irrespective—and to me this is important—irrespective of what belief or beliefs caused the Founding Fathers to include diversity jurisdiction in the constitutional grant, the basic question today is: Does diversity jurisdiction serve a useful purpose? If it does, it should be retained, indeed expanded if warranted.

I do not come to demean State courts. They are good courts. The brightest hours in our judicial history are those when the State and Federal courts have worked harmoniously in deciding both State and Federal matters.

There are many times when State and Federal matters are intertwined.

Let me discuss a field in which I have had both theoretical and practical experience—bankruptcy and reorganization.

As counsel for the trustee in the reorganization of the New Haven Railroad for over 10 years, I have found that often State and Federal law cannot be compartmentalized. The allowance and disallowance of claims have usually depended upon principles of State law, but not always. An objection that the claimant has received a voidable preference or fraudulent transfer will often turn on both State and Federal law; and its priority status may similarly intertwine State and Federal law, although the latter will usually predominate. What constitutes a preference under section 60 will usually depend in part upon State law, for example, as to when the transfer was made.

The trustee will usually be invoking State law under both section 70c, the strong-arm clause, and section 70e. Whether the claimant has a statutory lien, recognizable under section 67b, is more apt to involve State law but at times Federal law may be controlling.

The voidability of judicial liens under section 67a, will often involve both State and Federal law. In a Federal Nation such as ours, compartmentalization is often nonexistent. And, jurisdictionally, the Bankruptcy Act utilizes principles of diversity in section 23; and concurrent use of both State and Federal courts in avoiding preferences and fraudulent transfers. Sections 60b; 67e; 70e(3).

Senator BURDICK. May I ask a question at this time?

I'm an author of a bill that provided for a study of bankruptcy and one of the things that we found—that was a basis for the study—was the fact that we had concurrent jurisdiction and that it would be

concurrent in some cases; it's separate in other cases. A problem existed because one portion of a bankruptcy case such as a lien or a mortgage would be handled by the State courts and all of the procedural matters handled in the bankruptcy courts. Thus the bankruptcy court would have to wait for at least 10 years for the State court to act, and there was a strong feeling that once the bankruptcy court took the jurisdiction of the subject it should have exclusive jurisdiction to prevent all these delays that are occasioned by this double jurisdiction.

What would you think about an approach like that? Place it all in the bankruptcy court—foreclosures, liens, the determination of priorities, everything to stay in the bankruptcy court.

Mr. MOORE. Well, I'm not sure that I would approve of that wholeheartedly. It seems to me that there is properly a choice, for example, in bringing a suit to set aside a fraudulent transfer. As the fiduciary, the head of an estate, I can't understand why he should pick a State court to institute that suit if the calendar or docket is way behind.

On the other hand, if the State court docket is up to date and he could proceed rapidly, while the Federal docket is the other way, he would be justified, I think, in starting in the State court.

Senator BURDICK. Why couldn't a preference or fraudulent transfer be set aside in Federal court as well? If you have everything in the one basket in the Federal court.

Mr. MOORE. Could be, sir. Would you contemplate, sir, though, that that should be brought where the bankruptcy proceeding is pending?

Senator BURDICK. Certainly. Every facet of it be handled in Federal court.

Mr. MOORE. Well, your bankruptcy may occur, say, in Connecticut and an alleged preference may be in California. Now, do you purport to run nationwide service process on the preference? It wouldn't shock me.

Senator BURDICK. We're speaking now of claimants from all parts of the country to put in their claims.

Mr. MOORE. That's correct.

The present practice, you probably know, is that if the trustee has to bring a plenary suit, he would have to bring it in California.

Senator BURDICK. I simply wanted to relay to you that you're trying to do something about this service proliferation in bankruptcy and that the Commission is now studying the very point.

Mr. MOORE. May I perhaps inquire as to this: as you know, in railroad reorganization at the present time, anyone injured—and that includes FELA claimants and others—through the operation of the railroad can, without leave of the reorganization court bring suit. In the course of the 10 years that I've been counsel there, we've had all kinds of suits in both State and Federal courts and they don't come into our reorganization court. They're tried as an independent, civil matter.

Senator BURDICK. Is this under chapter 10?

Mr. MOORE. This is under section 77.

Realistic federalism uses both State and Federal courts when concurrent jurisdiction serves a useful purpose, as it might in bankruptcy. For example, when we discussed whether the plenary suit could proceed faster in the State court or whether it could proceed faster in the Federal court.

And the ALI seems grudgingly to recognize this principle partially. Thus, the ALI trims its sails in its general approach to federalism in sections 1301, 1302, and 1307; and in its more specific approach to interpleader, see sections 2361 and 2375, and in cases involving dispersed necessary parties, see sections 2371, 2373, and 2375.

According to the ALI, federalism includes, at least will tolerate, diversity when diversity serves what it conceives to be desirable. Indeed, it expands diversity in interpleader and in dispersed necessary party cases.

Hence we pass on to the crucial question—whither diversity?

My point 3 is that diversity jurisdiction should be retained and simplified, and so I return to one of my original premises—courts exist for litigants and the means for trying cases on the merits should not be lost in a labyrinth of technical entanglements.

So far as litigants are concerned, it is my belief that they support diversity jurisdiction; indeed, would welcome a simplification of, and a reasonable expansion of its principles to effect simplification. They are interested in cases being tried on the merits; and not a judicial statistic that merely represents a shift of a case from the Federal docket to a State docket.

Federal jurisdiction or the competency of a Federal court over a particular case is a concept invented by courts. It should be applied constructively and not destructively.

Too often Federal courts have made a fetish of Federal jurisdiction so that even a party who invoked the Federal court's jurisdiction is not estopped to raise lack of Federal jurisdiction after a trial on the merits; and an appellate court will raise lack of Federal jurisdiction in the trial court on its own motion.

This should be stopped. And I endorse the thrust of section 1386, although I would substitute the transfer of a case to an appropriate State court, or vice versa, in lieu of the dismissal provided for by subsections (b) and (c).

Transfer in lieu of dismissal would recognize the Federal and State courts as working partners not alien courts. This principle of transfer should be applied to other appropriate situations. See, for example, section 2373(b).

The principle of minimal diversity should be applied to all types of diversity cases—not merely to interpleader and dispersed necessary party cases. This would simplify the application of diversity tremendously, without an inordinate expansion for many non-Federal claims are presently triable in Federal courts due to principles of ancillary and pendent jurisdiction.

Corporate "citizenship" should be simplified; and certainly not be further technically entangled by the notion of a "local establishment" introduced by section 1302(b)(2). Similarly, the citizenship of a natural person should not be barnacled with a principal place of business or employment in a State qualification, as provided in section 1302(c).

This section is to deal with commuters and give them the corporate treatment of the preceeding subsection. In the first place, an alien commuter is unaffected by subsection (c). But putting that anomaly aside, I ask a modicum of kindness for the commuter. Take the Connecticut citizen commuting into Fun City. He shouldn't be downgraded into a second-class citizen.

On the contrary, he needs a decoration for perseverance; and this I know whereof I speak, since we operated for 7 years with commuter cars that were 50 years old. The poor commuter was never sure when he was going to get into New York, or when he was going to get back, and the present operation is not too much better.

I see no reason why a citizen of State 1 should not be able to invoke the jurisdiction of the Federal court of that State in a suit involving a citizen of another State. If you accept the ALP's major premise that diversity in general can be justified only on the basis of local bias or fear of that possibility, then section 1302(a) follows.

On my premise, that diversity jurisdiction is a vehicle for public service, section 1302(a) is not justifiable. Let me illustrate.

I was not connected with the case, but I knew of the situation. A, a citizen of Connecticut was seriously injured in an auto-pedestrian situation. Here was the breadwinner of the family. Because of diversity he invoked the Federal court's jurisdiction and obtained a substantial settlement within 4 to 5 months because the Federal dockets were up to date. No such result could have been obtained in the State courts in Connecticut where the dockets were over a year behind.

Now, some say well, why should he get that advantage when someone who is similarly injured doesn't have diversity available?

To me, the point is that although you can't cure everybody, I see no reason why you shouldn't do the best possible for the ones to which diversity jurisdiction will apply.

The fact that some are injured in Connecticut and will have to sue in the State court is, perhaps, too bad if the dockets are over-crowded, but I think that the best procedure and the best jurisdiction that can be given is none too good for the injured person.

Senator BURDICK. Professor, you're not contending before this committee that a rational basis for the transfer of cases would be based upon whether or not a docket is crowded?

Mr. MOORE. That is a factor that I think seriously should be considered. We have—

Senator BURDICK. Then why don't we transfer many other cases from many other areas? Why don't we transfer more and more cases?

If crowding is the basis for your argument, then we ought to shift more and more cases to the Federal court.

Mr. MOORE. No, we've got to stay within the blueprint of the Constitution. There isn't anything in article III that just says ship off a case to a court that wouldn't have jurisdiction over it. But my point is that if diversity jurisdiction is available, as article III makes it available, then anyone who has that diversity jurisdiction should be enabled to invoke it, and if the Federal dockets are more up-to-date, that's fine.

Senator BURDICK. Do you like the diversity as it is at the present time?

Mr. MOORE. I would go a little further, sir. For instance, I would eliminate the jurisdictional amount now found in 28 U.S.C. sections 1331 and 1332. I think that it is an unnecessary limitation that doesn't serve its objectives very well, and I would shift the power to the Federal court to try to keep these small claims cases out by allowing the court to assess costs and a reasonable attorney fee.

Now, Senator, you probably will recall, in the last war, the Emergency Price Control Act made any purchaser a private attorney

general, so to speak, to institute a suit to recover overcharge and damages and so forth. That statute had no jurisdictional amount. It gave concurrent jurisdiction to the Federal and the State courts.

But my limited experience in Connecticut was that these trifling suits, \$25, \$50, were not brought in the Federal court. In fact, I know that the Federal judges told the bar that they should not bring small claim cases in unless there was some real justification for it, and I think a disciplined bar can be expected to observe a rather clear admonition from the Federal judges not to come in with a small claim case.

Then, perhaps equally important, is that the jurisdictional amount limitation, while oftentimes leading to endless wrangling, doesn't cut out too many cases that should be eliminated.

For instance, in the tort field, almost any personal injury that is little more than a scratch—certainly, if there is any serious injury, will involve a claim far exceeding \$10,000. It's hard to fashion a jurisdictional amount that could screen out such cases that you would like to screen out without screening out cases of considerable magnitude. Under Supreme Court decisions, for instance, if the claims of A, B, and C are separate and individual, not related, they cannot be aggregated.

Take a consumer class suit that may, in the aggregate, involve hundreds of thousands of dollars but the claims of individual consumers are small, and they cannot be aggregated.

I just don't think the jurisdictional amount provision works well. I'm sympathetic with the idea that these small claim cases ought not to get into Federal court, but——

Senator BURDICK. What is to prevent them from going into Federal court under your theory?

Mr. MOORE. Two or three things. I think the judges can discipline the bar.

Senator BURDICK. But there's nothing in the law that prevents it.

Mr. MOORE. Well, sir, if a judge told me not to bring a small claim case in a Federal court, and I expected to practice before him again and again I'd take that as an admonition.

Senator BURDICK. We're setting up rules here to determine jurisdiction. We can't rely upon what some judge thinks. We've got to set the rules.

Now, there's no question about it. If you remove that \$10,000, there's nothing to prevent a \$5 case from going to the Federal court.

Mr. MOORE. That will be true, although I am suggesting that both costs and a reasonable attorney's fee be shifted to the person that brings the small claim suit. I don't know how it is in North Dakota, but where I grew up, in Montana, the districts courts had a general jurisdiction, similar to that of the supreme court in New York. There was no jurisdictional amount limitation, but the lawyers just didn't come in there with \$10 claims. They went before the justice of the peace.

Senator BURDICK. It isn't a question of what could be done. It's a question of what couldn't be done, is what we're dealing with, what can be done.

In other words, if you've got property damage in an auto case for \$50 or \$500 and it's not so much—your premise about the private calendar, why can't I bring it into the Federal court, because it's not crowded and I will get faster relief.

Mr. MOORE. Suppose the statute said that in cases where the amount in controversy was less than \$10,000 that the plaintiff would have to pay costs and a reasonable attorney's fee?

My objective is to shift the jurisdictional amount in a way that it doesn't get entangled in jurisdiction.

Venue in admiralty has always been fairly simple and appropriate principles of simplicity should control in diversity cases. On the contrary, while the ALI has written a simple venue for admiralty, it has written a complicated venue for civil diversity cases.

Undoubtedly, others can suggest further principles of simplification. Let us turn away from jurisdictional concepts that would delight Baron Parke, who loved procedural entanglements of all types. Let us make simplification of jurisdiction our goal, and let us keep the Federal courts as working partners with State courts in the diversity area.

I thank you, Mr. Chairman.

Senator BURDICK. Isn't the solution rather than to say that the litigant should have the option of going into a Federal court because of the crowded calendar in the State court, isn't it better to say that the State court should do something about very crowded calendars?

Isn't that more the answer to it?

Mr. MOORE. I suppose that is partially the answer. We are going to have this problem of congested dockets with an expanded population and the complexity of business. Both systems of courts have got to keep at the job continually.

I think a lot can be done in the Federal system that isn't presently being done, or isn't being done very well; and I have no doubt that the State courts could do better.

I think Federal judges ought to utilize civil rule 11 more than they do. That's the one that places the duty and responsibility upon the attorney, who signs a pleading or a motion, that it is interposed in good faith with substance behind it.

As a practical matter there just is too much motion practice. Some big firms have educated the young men in their office by interposing motions and sending them down to argue them. That ought to be stopped and a good judge can do it.

And a greater use can be made of the magistrates. In Connecticut the judges are finding that the magistrates can help them tremendously in motion practice and in policing discovery.

The trouble with the use of masters, I believe, has been twofold. One, the judge oftentimes practiced patronage too much; and two, the cost of the master was shifted to the litigant. Now, you could take a page out of section 77 dealing with railroad reorganization. For instance, the court of appeals sets up a panel of masters; and if the reorganization judge wants to appoint a master, he does it from that panel. You get away from improper patronage. And the cost of the master, I think, ought to be borne by the government rather than the litigant. He's being utilized as something in the nature of a vice-judge, and to shorten up the time from the commencement of suit to the trial. I'm not talking about the big, complicated case—

although tremendous progress has been made there in multidistrict litigation.

Pressure should be put on lawyers not to overdo discovery. Let the magistrates ride herd on them somewhat. And set the case down for early trial just as soon as it is at issue. Forcing lawyers to do what they ought to be doing from the outset to see whether they can settle the case; and don't grant a continuance except where there is really a justifiable reason.

I know in the New Haven organization, we had good personal injury trial lawyers in four States and good claim agents. At the very beginning, we sat down together and we agreed, that as soon as an accident was reported the claim agent would investigate it; and our men talked settlement. Where there was serious injury it seemed to me a suit should ordinarily be brought or at least the injured person should certainly be represented by counsel and adequate discovery had, including a physical examination if one was needed. We found the ICC had approved an accrual of damages based on a 5-year period, and it was agreed that if we could settle cases on an average within that, not beyond, we should do so.

Not only was it good business for the railroad, but it was just a humane thing to do. We found that we were settling cases at a lower figure than had formerly been the case when there had been extensive trials. We tried only a few cases where we couldn't settle or where the claim was seemingly out of line.

Simplification of Federal jurisdictional principles that I've advocated here will greatly help in dealing with crowded dockets. Early retirement of district and circuit judges—and my primary interest here is in district judges—and the appointment of a successor as soon as feasible are other factors. I wouldn't suggest early retirement if you were going to turn the Federal judge out to pasture just because he'd gotten to be 65 or 68. But he isn't turned out to pasture. He can retire and he can continue to be just as active as he wants to be, but it does take some pressure off. It gives him everything that he needs if he retires at the salary of the office. Then an appointment of his successor as soon as feasible would make a substantial amount of judge time available.

Senator BURDICK. I have a few short questions here, Professor Moore.

You will agree that we need both Federal and State courts to handle all the business of the United States.

Mr. MOORE. Yes, sir.

Senator BURDICK. And that you are committed to a dual system of courts? And that each State and the Federal courts should handle the case load properly and fairly?

You have no argument there?

Mr. MOORE. Right.

Senator BURDICK. But don't you agree that somewhere and somehow we must draw an appropriate line, a line based on reason, to apportion the judicial business between the State and Federal courts?

Mr. MOORE. Yes, sir.

Senator BURDICK. You would have us draw the line on the theory of minimal diversity and broad jurisdiction over Federal question cases.

Mr. MOORE. I'm not so sure that I would amplify the general Federal question jurisdiction, although I know that it is popular to urge that. The general Federal question case came in, as you know, in 1875, but it hasn't included as many cases as some would like. But whenever there is a particular type of Federal question that needs to be taken hold of, Congress can make a specific grant; and it is my experience that the specific grant gives far less trouble than the broad, general Federal question grant that you now see in 1331. This theory is somewhat in line with the point I made that you can't compartmentalize as much as some say between Federal and State rights. Those are oftentimes intertwined, as you know, in a great many cases.

Senator BURDICK. What are your views regarding 1301(b)(2) which relates to the citizenship of a partnership to that of the principle place of business?

Mr. MOORE. I think that is good. I wouldn't go on, though, and qualify that grant by the local establishment qualification.

I have long advocated that a partnership should be treated essentially as a corporation for diversity purposes.

Senator BURDICK. You have commented on the family provision of 1301(e) which would extend jurisdiction in those cases where all members do not have claims of \$10,000.

Do you agree that those cases should be brought within diversity jurisdiction?

Mr. MOORE. Yes, but I go much further and not limit it just to the nephew or the son or what not, as I illustrated.

Senator BURDICK. As far as that goes, you would approve it?

Mr. MOORE. No, for the reason that there would be haggling over who was a member of the family. I don't object to the members of the family being included in this, but I see no reason to get off on what this petty little thing is, when a broader use to me makes more sense.

Senator BURDICK. Is it petty to prevent a multitudinous action?

Mr. MOORE. I want to go further, sir.

Senator BURDICK. But, as I say, we agree that as far as that goes, it's an improvement.

Mr. MOORE. It's an improvement subject to haggling as to what these phrases mean.

Take Federal rules 18 and 20. They state broad principles as to binder of claims and parties; and yet the application of those rules is very restricted because of jurisdictional principles.

Senator BURDICK. You have given us your views on the multiparty, multi-State. Do you agree in principle that there should be a provision for these kinds of cases?

Mr. MOORE. On the dispersed party case?

Senator BURDICK. Multiparty, multi-State.

Mr. MOORE. Yes, I do.

Senator BURDICK. The purpose of diversity jurisdiction historically was to protect the outsider to assure an even load of justice to the traveler or stranger. If that is so, why should a resident plaintiff be allowed to invoke this jurisdiction?

Mr. MOORE. It's my point that it's not unimportant what caused that to be put in there. If I really believed that the only bases for having diversity today are bias and prejudice, I wouldn't care to make a case for it.

Sure there may be some, but I have great confidence in State courts. If the only thing we can say today is that diversity is warranted only because of bias or prejudice or fear of it, my attitude, as of today, would be to eliminate diversity.

Senator BURDICK. Don't you think it's a little bit inconsistent and incongruous to give an in-State plaintiff the option of going into the State court or the Federal court?

Mr. MOORE. Not to my mind.

Senator BURDICK. But denying it to the in-State defendant?

Mr. MOORE. I do. I agree with you.

Senator BURDICK. Wouldn't this bill be a correction to that incongruity?

Mr. MOORE. I would correct it a different way. I would permit the in-State defendant to remove.

Senator BURDICK. So then you would enlarge it?

Mr. MOORE. Yes.

This bill also enlarges diversity every now and then. It restricts it at certain points and enlarges it in others.

For instance, in your removal section 1304(b) any defendant can remove if the case is otherwise removable. Today as you know all the defendants must generally join in the removal petition. The bill also provides for a third party defendant to remove.

Senator BURDICK. I don't think we've ever said the bill was to extend or to contract. The purpose of the bill was to get an orderly division of the jurisdiction of the Federal and State courts. It wasn't to contract or expand.

The purpose was to try to get a rational basis for jurisdiction.

My next question is what is your view of 1301(b)(4) which looks at the residence of a deceased and not his executor or administrator to determine the diversity of citizenship?

Mr. MOORE. I have no objections to that.

This has been written largely because the Federal courts, especially in Pennsylvania, allow their jurisdiction to be greatly abused.

Senator BURDICK. Now you say that by using the term "legal establishment" that you get into secondary questions and facts. I forgot the language you used, but you used the word "the principle place of business" as is adopted now for corporations.

Aren't there a lot of cases where this term is also litigated?

Mr. MOORE. Yes, but when that was put in in 1958 it was on the theory that—well, one of the theories—that that term had some background in the Bankruptcy Act and the precedents there would be helpful.

Now, in all fairness and candor, I don't think that bankruptcy precedents helped too much, but there's only one principal place of business.

As to the local establishment, on the other hand, the corporation could have loads of local establishments. You would be litigating that many more times than you would ever be litigating the principal place of business qualification.

For instance, A wants to sue United States Steel in Connecticut. There may be a question as to where the principal place of business of United States Steel is, but there's no doubt that it's not in Connecticut. So in many, many situations, the issue of principal place of business never really becomes serious.

But it does cause trouble once in a while.

Senator BURDICK. Let's get back to this local establishment.

Let's assume this state of facts. Say in the city of Fargo there's a Sears, Roebuck Co. store and let's say its principal place of business is in Chicago. Right next to it a similar store deals in the same type of business, and let's call it the Sunshine Mercantile Co., a North Dakota corporation, side by side competing.

Why should the customer who feels aggrieved by something, sue Sunshine, the local corporation, in State court, while he is permitted to sue Sears in Federal court? Does that make any sense?

Mr. MOORE. The plaintiff is a citizen of what State?

Senator BURDICK. North Dakota, and the principal place of business, for the sake of argument, of Sears, Roebuck in Chicago, so it could be transferred to the Federal court.

Mr. MOORE. That doesn't bother me. I'm not thinking of being in the Federal or State court for what I might call any substantive advantage. In my mind when Erie-Tompkins came along, it removed one of the most serious objections, at least for me, to diversity jurisdiction. Once you get to the procedural side of trying the case, it doesn't matter much to me whether it is in the Federal court if it can get there, or if it is in the State court.

Senator BURDICK. Your opening premise here indicates that these rules are adopted for the purpose of, not lawyers, not judges, but the litigants, but this Fargo litigant now may have to hire a lawyer in Chicago.

Mr. MOORE. Wait a minute. He starts in the Federal court in North Dakota, doesn't he?

Senator BURDICK. No, he sues in the State court, the plaintiff. He can sue Sears-Roebuck as a local establishment and then it removes.

Mr. MOORE. Sears removes to Federal court?

Senator BURDICK. Yes.

Mr. MOORE. Well that case shouldn't end up in Chicago, necessarily. If this accident occurs—assume it's an accident——

Senator BURDICK. It might be a breach of warranty.

Mr. MOORE. A breach of warranty on what? Merchandise sold in Fargo?

Senator BURDICK. You're right. There probably would be venue in the Federal courts of North Dakota. You're probably right.

But it would be removable to the Federal court.

Mr. MOORE. Yes.

Senator BURDICK. But why should Sears have the right to venue?

Mr. MOORE. Well now you're raising a question as to whether removal jurisdiction should be available essentially when there was original jurisdiction. If you go along with my premise that the substantive law that's going to be applied is the same, then I don't see that the defendant is going to get any great advantage except, perhaps, a procedural advantage. But in the old days of *Swift v. Tyson* there was a great desire on the part of defendants, if the State law was against them, to remove.

Senator BURDICK. That was before, *Erie v. Tompkins*.

Mr. MOORE. That's right. Montana Power for example, was a Delaware corporation with all of its assets in Montana except for a few in Idaho and Wyoming; and it had a tremendous advantage at that time. If it was sued by a citizen of Montana it would just remove.

That was wrong, because they were removing not to get a speedy trial, or anything like that, but to take advantage of *Swift v. Tyson*.

I think there is a question that the staff would like to ask

Mr. MULLEN. Mr. Moore, in your article with Professor Weckstein on diversity jurisdiction, you expressed disapproval of the insurance amendment on direct actions, section 1332(c) which deems an insurer to be a citizen of the State of the insured in a direct action against the insurance company.

Now, as I understand it, the group said that amendment was passed largely to remedy a situation that arose in Louisiana where they had a State direct action statute, and as I further understand it, it was a Louisiana plaintiff that chose the Federal district courts in order to avoid a broader review of a jury verdict by the Louisiana appellate court under their civil law.

Now you argue that because an insurance company will ultimately pay the bill, such cases ought to be admitted in the Federal courts.

I would like to know why you feel that an instate party should be able to use diversity jurisdiction to override the policies of his own State because he prefers Federal procedure. Doesn't this run counter the purpose of diversity jurisdiction which is to protect outsiders, namely, in this case, the defendant insurance companies?

Mr. MOORE. Well, if we start out with the premise that diversity jurisdiction can only be justified on the basis of bias or fear of it, then I will agree with you. That's the ALI's premise, but that's not mine.

Mr. MULLEN. What principle of law should allow a party to chose a different forum to circumvent the policies of his own State?

Mr. MOORE. What policies?

Mr. MULLEN. Well, in this case, the organization, the structure of its courts, which allows a certain type of review of civil trial.

Mr. MOORE. That would be subverted? You talk about subverting the policy of the State. If so it is because of the seventh amendment.

In any case, the suit is in the Federal court in Louisiana.

Mr. MULLEN. That's true, except that where you have the direct action cases, they are cases which involve primarily legal actions between two citizens of Louisiana?

Mr. MOORE. Yes.

Except I should add this, though. Under Louisiana law, the injured person does have a cause of action against the insurer which he can prosecute without ever suing the alleged tortfeasor, so he does have a cause of action against a foreign corporation.

Mr. MULLEN. But if you look at the docket in Louisiana in those years prior to this amendment, it was the resident plaintiffs who were invoking diversity jurisdiction and not the outsider.

Mr. MOORE. Well, one of my objections is to carving out little bits of special limitations on this or that. I don't propose to bleed and die on the face of trying to get that insurance matter changed.

There are two or three other States, Wisconsin, I recall has that, and they seem not to have had any great problem there. It came up, as you point out, Louisiana law because of the different attitude of the civil or common law on the right to jury trial.

Mr. MULLEN. Recently a case arose where a merchant whose building burned in a fire was suing a furnace manufacturing company for alleged negligence in making the furnace that caused the fire.

The court required the seven insurance companies to be joined as necessary party plaintiffs and it also tentatively ruled that five of those companies could not be joined because their portion of the insurance was less than \$10,000.

In other words, this was pooled insurance among the seven for over \$50,000, but with five insuring at value of less than \$10,000.

When should the judge order that all of these insurance companies be named as necessary party plaintiffs?

Mr. MOORE. Well, if the insurance companies haven't paid, then the insured, it seems to me, is clearly a real parties interest, the proper plaintiff, and the only plaintiff, to sue.

Where the companies have paid, that has caused quite a wrangle among the courts. The insurance companies oftentimes, in order to keep themselves from being a plaintiff, have billed the insured under a so-called loan theory. It's a sham device, because the loan will never be repaid if the insurance company doesn't collect, and numerous courts would require that they be plaintiffs.

Now, I'd like to use your example, in part, to show the difficulty in jurisdictional amount.

Mr. MULLEN. Well, that was my second question.

Assuming that these insurance companies had paid and, should be named party plaintiffs, then should the total value of this property and the total amount of insurance be considered in mass to exceed the \$10,000?

Mr. MOORE. You run into two competing principles. Is the right an integrated right?

If it is, the jurisdictional amount would be the \$100,000. If, however, it is thought of that each one have a several and not an integrative right, then there could be no aggregation and only the insurers with amounts in excess of \$10,000 could join, and that, I think, is a further illustration of how ridiculous this jurisdictional amount provision gets at times.

Mr. MULLEN. Would you consider this particular kind of situation the amount to be integrated? Or would you consider this to be a segregated—

Mr. MOORE. My theory is that you would stop worrying about the jurisdictional amount.

Mr. MULLEN. But assuming we still had the \$10,000 barrier, how would you analyze the situation?

Mr. MOORE. You mean I've got to decide this case without the benefit of counsel and briefs?

I think I would plug for the theory that it was an integrated right, but I might be overruled by a court of appeals.

Mr. MULLEN. I tend to agree with you, in other words I think that with this kind of pooled insurance the court should look at the total value and that this amount should be considered together and—I've forgotten the language, but in your testimony, it seems to me that if you try to find out if these were separate and several rights that were being—you would get back into the very technicalities that you object to. The Court should not have to make that kind of decision.

Mr. MOORE. I can't see how that follows if you adopt the elimination of a jurisdictional amount.

Mr. MULLEN. I'm saying if you keep the jurisdictional amount.

Mr. MOORE. Each individual with a separate and several interest would have to satisfy the jurisdictional amount. In the consumer class actions, as illustrated by two cases that went to the Supreme Court, *Snyder v. Harris*, the Supreme Court followed the old *Pinel* doctrine. Since the interests of the various consumers were several, they couldn't be aggregated.

That would mean in your insurance case if the claims of the insurance companies are several, they couldn't be aggregated. Now in both of those class actions, realistically the controversy involved \$7 or \$8 million in one suit, I think, and the other involved half a million or maybe a million.

The defendants were stoutly challenging the use of the class action. In one case the consumer had a claim for \$7.85, as I remember, but was suing on behalf of himself and all other consumers, who had allegedly been overcharged.

The amount in controversy, from any realistic point of view, and the defendants so recognized, was the \$7 or \$8 million, but your jurisdictional amount kept that case out.

On the other hand, the person who suffers just moderate personal injuries can always make a claim in excess of \$10,000 in good faith. A whiplash is always far in excess of \$10,000.

Mr. MULLEN. Don't you think it would be better to try to devise some kind of test which would avoid the search for whether the interests were separate or integrated and instead use some kind of a functional test, such as whether the cause of action arises out of the same, a single transaction or occurrence?

Mr. MOORE. That's been litigated, sir, for years.

Mr. MULLEN. Don't you think that would be a better kind of a test to apply in the insurance situation rather than a search for whether the interest were joint or whether they were separate?

Mr. MOORE. Well, almost any test would be better than the separate and several tests that we have now.

(A brief recess was taken.)

Senator BURDICK. I want to thank Professor Moore for his contribution this morning. I just want to say, in parting, that I hope that we've brought about some kind of vigorous and spirited dialogue, as you said in your opening remarks. It was really helpful and it will be considered very seriously.

Mr. MOORE. Thank you, Mr. Chairman.

Senator BURDICK. Our next witness will be Prof. Donald T. Weckstein, School of Law, University of Connecticut, West Hartford, Conn.

And I understand you're the collaborator with Professor Moore under his articles.

Mr. WECKSTEIN. That's correct, sir.

Senator BURDICK. You may proceed in any manner you wish.

STATEMENT OF PROF. DONALD T. WECKSTEIN, SCHOOL OF LAW, UNIVERSITY OF CONNECTICUT

Mr. WECKSTEIN. Thank you, sir. I have already submitted a statement to the committee, and rather than read it word for word, I will summarize pertinent parts, trying to avoid overlapping what Professor Moore has already stated.

Senator BURDICK. This procedure is very well received, and your entire statement will be made a part of the record and you will proceed in summary.

(The document referred to follows:)

STATEMENT BY DONALD T. WECKSTEIN, PROFESSOR OF LAW, UNIVERSITY OF CONNECTICUT

S. 1876 is the product of an extensive Study by the American Law Institute of the Division of Jurisdiction Between State and Federal Courts (A.L.I. 1969). In large part, it proposes the reenactment and refinement of jurisdictional provisions that have well served the American people. More substantial changes are made by some sections of the Bill, and, with the exceptions to be noted, I support them as desirable reforms consistent with the contemporary role of the federal courts.

My primary concern and principal disagreement with S. 1876, as well as the underlying ALI Study, relates to the provisions which would substantially curtail the availability of the federal courts on the basis of diversity of citizenship jurisdiction. In particular, I would urge the deletion of proposed § 1302 (a) through (d) which would prohibit the invocation of diversity jurisdiction, either originally or on removal, in any federal district court in a state of which a person, corporation, or unincorporated association is a citizen or has been locally established for more than two years. (§ 1304 (a) would also have to be amended to reflect the changes which I propose.)

These provisions are said to reflect the basic approach of the American Law Institute Study "that so far as possible state cases should be tried in state courts." [Study, p. 458.] The vice is in the application of this assumption; that diversity cases are state cases not federal in nature. Article III of the Constitution establishes two categories of cases in which the jurisdiction of the federal courts is authorized. In one, the federal element is found in the nature of the subject matter (cases arising under the Constitution, laws, or treaties of the United States; admiralty and maritime cases). In the other, the federal element is found in the nature of the parties to the controversy—regardless of the source of law under which they arise, whether state, federal, or international. This second category includes cases affecting ambassadors, public ministers and consuls, controversies in which the United States is a party, or those between two or more states or between a state and citizens of another state or foreign country, as well as controversies between citizens of different states or a citizen and an alien. Thus, under the principles of federalism adopted by our Constitution, diversity cases are as much the business of the federal courts as federal question cases. Diversity cases do possess a federal element: the controversy is between citizens from more than one state and there is no tribunal outside of the federal court system to which all parties to the controversy can claim allegiance. And this federal element is present whether it is the out-of-state party or the local resident who invokes the federal court's jurisdiction.

Notwithstanding this constitutional charter for diversity jurisdiction, it is now settled that Congress has the power to vest less than the whole of the jurisdiction authorized in Article III. Times have changed since 1789 when the First Judiciary Act created federal trial courts and vested them with jurisdiction in diversity cases. The appropriate inquiry today, as recognized by the A.L.I., is to what extent, if at all, there is still a need for this type of federal jurisdiction.

The A.L.I. Study asserts that the present function of diversity jurisdiction "is to assure a high level of justice to the traveler or visitor from another state. . . ." [Study, p. 2]. This, of course, is a vestige of the traditional local prejudice basis for diversity, a basis which the A.L.I. commentary acknowledges has its contemporary counterparts although in sometimes different and diminished forms. Two factors with regard to this historic parallel should also be noted. The earlier concern, as is today's, was not dependent upon proven or actual local prejudice, but with the *apprehensions* of many people (especially, in prior times, investors and creditors) that they *might* be subject to such bias in the courts of some states. Secondly, the extent of jurisdiction vested by Congress to apparently induce such fears nevertheless included the right of a citizen to originally invoke diversity jurisdiction in a federal court in his own state against an out-of-state citizen.

The principle accepted by the A.L.I. Study is not merely concerned with avoiding possible local prejudice in state courts, but in assuring a high level of justice to the out-of-state citizen. This is not to say that a high level of justice is unobtainable in state courts, but only that an out-of-stater should enjoy the security of knowing that he may resort to the federal courts where he would almost consistently find the high quality of justice for which they have become known. Once again the emphasis is upon relieving possible apprehensions of potential suitors and not on demeaning state courts. Unfortunately, the A.L.I. Study did not carry this principle far enough. Although a citizen may be dissatisfied with the quality of justice in his own state, he is estopped from invoking diversity in the federal courts of such state on the apparent theory that he shares "in its political life" and "is properly held to responsibility for its institutions. . . ." [Study, p. 107]. The realism of this assumption is stretched even further when applied to corporations and other businesses which have maintained a local establishment for more than two years (§ 1302(b)), and is completely discarded when the estoppel is similarly applied to a commuter of more than two years standing. (§ 1302(c); Study, p. 131).

The fact is that citizens of all states look with favor upon the quality of justice in the federal courts, and their lawyers (who clearly can not plead ignorance or lack of a voice concerning the procedures in their own state courts) frequently resort to the federal courts in diversity cases to obtain the benefits of modern discovery and pre-trial practices, liberal pleading and third-party practice, juries without unduly close local attachments rendering verdicts with the same safeguards and force as at common law, and judges of high caliber, adequately compensated, independent of political or non-judicial influences, with power, as at common law, to control the trial. In other words, these lawyers seek for their clients the highest quality of justice available for their particular controversy. And isn't this what courts are for? Just as law is made for man and not man for the law, do you not create courts to serve suitors and not statistical summaries or simplistic slogans. Regardless of the merits of the courts of individual states, is it not a function of the national government, under our system of federalism, to continue to make available to the broad extent authorized by the Constitution, that high quality of justice which its citizens have sought in such great numbers for so many years?

Two empirical studies in Wisconsin and in Virginia, of why lawyers invoke diversity jurisdiction on behalf of their clients, testify to the continuing need and demand for the availability of the jurisdiction to at least the same extent as at present. In the Wisconsin study [M. Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases*, 47 Iowa L. Rev. 933 (1962)], 41.2% of the reasons given related to the type of procedures or personnel expected to be found in the federal courts. These were broader discovery (15.9%), greater confidence in the independence and judicial temperament of judges (9.8%), more current calendar (9.1%), and superior juries (6.7%). Although the author of the survey report dismisses many of these factors as "tactical" (as does the A.L.I. Study), it seems to me that they demonstrate that Wisconsin lawyers and litigants appreciate and utilize the high quality administration of justice that has been made available to them through diversity jurisdiction. Other reasons for selecting federal courts revealed in the Wisconsin survey include: geographic convenience (18.3%), higher jury awards (14%), client preference (6.7%), and fear of local prejudice (4.3%).

This last factor loomed much larger in the Virginia survey [Note, *The Choice Between State and Federal Court in Diversity Cases* In Virginia, 51 Va. L. Rev. 178 (1965)]. Fear of local prejudice against an out-of-state plaintiff was given as a reason for resort to the federal court by 60.3% of plaintiff's counsel surveyed, and fear of local prejudice against a defendant-insurance company was suggested as a reason by 46.4% of defendant's counsel. Once again, factors affecting the quality of justice were deemed significant. Discovery rules were named a reason for invoking diversity by 66.6% of plaintiff's counsel and 62.1% of defendant's counsel. Use of pre-trial conferences were given by 51% and 52.7% of plaintiff's and defendant's lawyers, respectively, and availability of third-party practice (impleader) by 46.4% and 57.4%, respectively. Other influential factors favoring the selection of state rather than federal courts were litigation costs, familiarity with judges, limited participation of judges in trial, accessibility of the courts and local prejudice favoring the client.

There seems little doubt that great numbers of the practicing bar throughout the country endorse, at least by means of their usage, the contemporary utility of diversity jurisdiction and its continued availability. A few years ago, Al Cone, the then president of the American Trial Lawyers Association, commented ad-

versely on the A.L.I. proposals to curtail diversity, and added that: "In most areas around the country, the writer has not been able to find a single trial lawyer who did not believe that a right to the choice of jurisdiction, where diversity of citizenship exists, was not an important right of his client, and one which should be preserved." And again: "No lawyer who has discussed this matter with the writer has been able to find any basis for justifying this change, except that it would lessen the caseload of federal court judges. The effect on the caseload of state trial court judges has apparently gone unconsidered." [Trial Magazine, December 1966/January 1967, p. 9.]

My comments have concerned a few of the contemporary justifications for continuing diversity jurisdiction without such impairments as are contained in § 1302 of S. 1876. Other valuable functions such as aiding uniformity in certain areas of the law, avoiding friction and promoting harmony among the states, foreign nations, and the citizens of each, encouraging procedural reform in state and federal courts, and providing a forum for cases involving multiple parties from several states are also worthy of consideration. Yet the A.L.I. Study, and this implementing Bill, acknowledge only the last reason given and the next to the last as it relates to foreigners. [For more extended treatment, see Moore & Weekstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 *Texas L. Rev.* 1, 14-27 (1964).]

Having summarized the general philosophical basis of my disagreement with the A.L.I. Study, perhaps a few brief comments on the particular provisions of the bill concerning diversity will be in order.

§ 1301(a) re-enacts existing law and is acceptable. § 1301(b)(1) alters existing law by making a corporation a citizen of every state in which it is incorporated, thus removing an anomalous situation concerning corporations chartered in more than one state. I support this clarification. [See Weekstein, *Multi-State Corporations and Diversity of Citizenship*, 31 *Tem. L. Rev.* 195, 210-216 (1964).] This subsection also extends citizenship, for diversity purposes, to foreign corporations on the same basis as domestic ones. This is also desirable. [See Moore & Weekstein, *Corporations and Diversity of Citizenship Jurisdiction*, 77 *Harv. L. Rev.* 1426, 1435-36 (1964).] § 1301(b)(2), providing that a partnership or other unincorporated association shall be deemed a citizen of the state where it has its principal place of business is also a desirable addition to the law, and one invited by the Supreme Court. [See *United Steelworkers v. Bouligny*, 382 US 145 (1965). See also Moore & Weekstein, *Diversity Jurisdiction: Past, Present and Future*, 43 *Texas L. Rev.* 1, 32-33 (1964).] It is not clear, however, that the qualification that the association be "capable of suing or being sued as an entity in the State in which the action is brought" is necessary or desirable. This would seem to affect capacity, under Federal Rule 17, and should not be intermingled with subject-matter jurisdiction.

While § 1301(b)(3) continues a law adopted in 1964, it should be deleted from the Judicial Code. The insurance company, in any true sense of the term, is the real party in interest in a direct action suit, and its citizenship should be controlling when the insured is not joined. [See Weekstein, *The 1964 Diversity Amendment, Congressional Indirect Action Against State "Direct Action" Laws*, 1965 *Wisc. L. Rev.* 268.] The 1964 Amendment has also given rise to problems where it has been attempted to be invoked against insurers in cases not contemplated by the Amendment.

§ 1301(b)(4) deals with a very difficult situation. Recent circuit court cases have denied diversity jurisdiction where the only purpose for appointing an out-of-state fiduciary was to create diversity jurisdiction. This involves the federal courts in the difficult question of determining motive and does not reach the opposite situation where a representative is appointed to defeat diversity. Thus, legislative relief along these lines is probably in order to avoid the abusive manufacture or destruction of federal jurisdiction.

§ 1301 (c) and (d) justifiably re-enact existing law. Subsection (c) is new in the Code but reflects some recent lower court decisions and makes eminent sense. Subsection (f) is also desirable.

I have already commented critically on the general philosophy underlying § 1302. I add only that a jurisdictional provision which prohibits a citizen of State A from suing a citizen of State B in the federal courts located in State A but permits him to sue the same party in the federal courts of State B fails to "satisfy the untechnical requirements of ordinary common sense", and is the kind of anomaly that the Bill properly eliminates in connection with corporations chartered in more than one state. [See *Gavin v. Hudson & Manhattan Railroad*, 185 F2d 104, 105-106 (3d Cir. 1950) (opinion of J. Goodrich)]. Further, the concept

of "local establishment" for two years compounds the error just alluded to by creating yet another sub-class of citizenship, the legal significance of which varies with the state of forum. It also sets up an arbitrary classification and unnecessarily complicates the determination of jurisdictional questions. [See D. Currie, *The Federal Courts and the American Law Institute*, I, 36 U. Chi. L. Rev. 1, 45-49 (1968)]. Similar objections must be made to the commuter provision, § 1302(c), in addition to those indicated previously. Subsection (d) should fall with the remainder of § 1302 to which it applies.

§ 1302(e) broadens existing law to exclude all workmen's compensation cases from the federal courts instead of just actions removed from state court. The 1958 Amendment intended to give the injured employee an option of suing in the federal or state court on workman's compensation claims which are permitted by state law to be determined by court adjudication. This option, with perhaps a refinement of existing law, should be preserved.

Other provisions of the bill, especially those regarding removal jurisdiction in diversity cases and multi-party multi-state diversity, contain desirable and needed innovations. Consistent with the principles previously articulated, I would extend diversity jurisdiction to make the federal courts available almost to the full extent permitted by the Constitution (excepting only the jurisdictional amount and other restrictions already noted). Thus, I would favor the addition of a provision expressly disapproving the complete diversity requirement and substituting minimal diversity for all cases, not just interpleader and multi-party multi-state actions. I would also eliminate the restriction on a citizen of a state removing an action brought against him in such state. But for now, it is more important that we preserve what we have, that which has served us long and well, from unwanted and unneeded impairments.

The federal courts, and the Constitutional and Congressional draftsman who framed their jurisdiction and procedures, have become the victims of their own success. Litigants, guided by their lawyers, seek federal court justice in increasing numbers—both in diversity and federal question cases. Faced with evermounting docket congestion, the notion that diversity cases, since they involve questions of state law, should be substantially curtailed has a definite surface appeal. But there are other values to be served; and these have been considered decisive by both those who wrote and adopted the Constitution and the implementing jurisdictional statutes. And, I might add, with the apparent support of the practicing bar and presumably those they represent, the people. These values, although changing somewhat in form and emphasis today, remain of significance and are reinforced by newly developed reasons to continue, and in some cases expand, the diversity jurisdiction of the federal courts.

Mr. WECKSTEIN. I appreciate the opportunity to appear before this committee and the spirit in which the Senator is conducting the inquiry into this important bill.

My concern is primarily with the diversity provisions of the bill, for that is the area which I have studied in greatest depth, and which, I believe, the ALI bill, S. 1876, makes the most drastic changes in.

In general I concur with most of the other provisions of the bill. My specific objections are most strongly to section 1302 (a) through (d) which would prohibit the invocation of diversity jurisdiction, either originally or on removal in any Federal district court in a State in which a person or a corporation or unincorporated association is a citizen or has been locally established for more than 2 years.

My basis for urging the deletion of this section lies in the underlying philosophy of the ALI's approach to diversity jurisdiction which is incorporated in this bill.

These provisions are said to reflect the basic approach that "so far as possible State cases should be tried in State courts." The vice is in the application of this assumption that diversity cases are State cases, not Federal in nature. In fact, under the principles of federalism adopted by our Constitution, diversity cases are as much the business of the Federal courts as are Federal questions cases. They each possess a Federal element. In diversity cases, the con-

troverſy is between citizens from more than one State, and there is no tribunal outside of the Federal court ſystem to which all parties to the controverſy can claim allegiance. And this Federal element is preſent, whether it is the out of State party or the local reſident who invokes the Federal court's juriſdiction.

The ALI ſtudy further aſſerts that the preſent function of diversity juriſdiction is "to aſſure a high level of juſtice to the traveler or viſitor from another State." This reflects veſtiges of the traditional local prejudice baſis for diversity, but it inſufficiently expreſſes the contemporary functions of diversity juriſdiction.

First of all, it ſhould be emphasized that the traditional local prejudice baſis for diversity was not that there was in fact local prejudice, but that the litigants had fears that there might be local prejudice. It was theſe apprehenſions which the framers of the Conſtitution and the Congress in 1789 were concerned with.

The principle accepted by the ALI ſtudy is not merely concerned with avoiding poſſible local prejudice in State courts, but in aſſuring a high level of juſtice to the out-of-State citizen. This is not to ſay that a high level of juſtice is unobtainable in State courts, but only that an out-of-stater ſhould enjoy the ſecurity of knowing that he may reſort to the Federal courts where he would almoſt conſiſtently find the high quality of juſtice for which they have become known.

Unfortunately, the ALI ſtudy did not carry this principle far enough. Although a citizen may be diſſatisfied with the quality of juſtice in his own State, he would be eſtopped from invoking diversity in the Federal courts of ſuch State on the apparent theory that he ſhares "in its political life" and "is properly held to reſponſibility for its inſtitutions."

As Judge Skelly Wright indicated in an article in the *Wayne Law Review*, not only is this unrealistic, but it is unfair in the ſenſe that this particular litigant may have actively opposed the current procedures in the State court, yet nevertheless, under the ALI propoſal he is bound by them and cannot reſort to the Federal procedures.

The fact is that citizens of all States look with favor on the quality of juſtice in the Federal courts, and their lawyers frequently reſort to the Federal courts in diversity caſes to obtain the benefits of modern diſcovery and pretrial practices, liberal pleading and third-party practice, jurors without unduly cloſe local attachments rendering verdicts with the ſame ſafeguards and force as at common law, and judges of high caliber, adequately compensated, independent of political and nonjudicial influences, with power, as at common law, to control the trial. In other words, theſe lawyers ſeek for their clients the hiſheſt quality of juſtice available for their particular controverſy, and this, after all, is what courts are for.

Theſe aſſertions are ſupported by two empirical ſtudies which were reported in the *Iowa Law Review*, and the *Virginia Law Review*. I will not make a detailed reference to theſe ſtudies except to ſay that they fully ſuſtain the propoſition that lawyers do ſeek the Federal courts becauſe of the good procedures and the high-quality juſtice that is thought to be available there, and that, while local prejudice played a large role in ſome parts of Virginia, it did not hold as ſignificant a role in the ſtudy of Wiſconſin caſes, which was contained in the *Iowa Law Review*.

These sentiments are also endorsed by an informal survey made by Al Cone, the former president of the American Trial Lawyers Association, who said that he could not find "a single trial lawyer who did not believe that a right to the choice of jurisdiction, where diversity citizenship exists, was not an important right of his client and one which should be preserved."

Having summarized the general philosophical basis for my disagreement with the ALI study which is further emphasized in my statement, and in the articles of Professor Moore and myself, to which he has referred, let me make some brief comments on specific provisions of the bill.

Senator BURDICK. Before you go into that, may I ask a question at this point?

Your thesis seems to rest on the fact that justice in the Federal courts is of higher quality and superior to that in State courts.

Mr. WECKSTEIN. In some cases it is superior. It is consistently of a high quality. In other cases, the State courts are certainly as good.

Senator BURDICK. Well, you made a general observation that they go there because the justice is superior, so I would assume that the Federal system was superior to the State system then.

Mr. WECKSTEIN. This is not consistently true throughout the Nation. There are two important factors. One, that litigants and their lawyers may feel the Federal courts are superior and just as in the former days of diversity jurisdiction, we were concerned about the apprehensions that litigants and lawyers had about prejudice, we are here concerned with meeting the fears and desires of the people—the people who litigate in our Federal courts. That's one aspect.

Senator BURDICK. Whether or not it is superior, they just may feel it's superior. That really strikes at our dual system of justice, doesn't it?

Mr. WECKSTEIN. I'm not sure that it does. I think a dual system of justice is an integral part of Federal jurisdiction and State jurisdiction, and this leads me to the second factor. That is that the choice ought to be available to the individual litigant, or to his counsel, to decide whether he prefers the Federal or State court and that we should not preempt that choice by legislation.

Senator BURDICK. Have you ever been a general practitioner in your life?

Mr. WECKSTEIN. I was in practice for a very short time. About a year.

Senator BURDICK. Professor Moore suggested that the one reason you go into the Federal courts is because of congestion and you're indicating now that you go into Federal courts because the justice is superior.

Well, having been a practitioner for 25 years I find that the reason you go into Federal courts is that they compare the particular case they have at hand as to many factors besides the justice dispensed. The jury panel, the time of the season. It's a shopping situation. That's what it really is. They shop and see where they get the best deal for their clients.

Mr. WECKSTEIN. I don't doubt that that's true, nor do I look down upon trying to get the most favorable forum for your client. I think that's the obligation of a lawyer.

Senator BURDICK. In other words, you shop at the best bargain basement you can find for the moment, regardless of our dual system.

Mr. WECKSTEIN. I think so, but if we look at the reasons why the lawyers, both on behalf of plaintiffs and defendants, seek the Federal courts, what you are now suggesting may be purely tactical considerations, also have to do with the kind of procedures and kind of justice which is dispensed in the Federal courts.

Senator BURDICK. If we're to have a dual system, wouldn't it be better to see that the State courts are upgraded, if we're going to have a dual system?

Mr. WECKSTEIN. I think that the State courts ought to be upgraded for reasons aside from the dual system simply because the government, whether State or Federal, ought to make the best administration of justice available.

In Australia, for example, they do not have Federal trial courts. They have a Federal system. They have copied our article III of the Constitution verbatim, but they never created Federal trial courts, and most all cases are initially tried in the State courts. That's the system they have lived with for years. Our system is a different one, but even in Australia there is now a movement to create Federal trial courts because many people feel the States are not adequately handling certain kinds of controversies.

We are given a tradition of dual courts, for whatever reasons, stemming from the Constitution, to the present date, and I don't think we should attempt to abolish the system at this time. Although, at the outset, if there had not been the strong hostilities between States and strong feelings of State autonomy, it may have made sense to only have a single system of courts. But that is not our system.

Senator BURDICK. Do you think that this trend may lead us to one system of courts?

Mr. WECKSTEIN. I doubt it. I would rather think that it will lead us to—and I hope it will lead us to—a system of good courts in both the Federal and the State areas with the choice in the litigant, with the advice of his counsel, as to where he should try his case, at least with the constitutional basis for diversity citizenship that presently exists.

Senator BURDICK. Wouldn't it be better to make this decision on an orderly, logical, sensible basis rather than with all this fluctuation?

Mr. WECKSTEIN. I think the recommendations by Professor Moore and myself, and others who are here, do provide an orderly, rational basis.

Senator BURDICK. You still leave the option open. You still leave the options open and the shopping available.

Mr. WECKSTEIN. I don't think that's irrational. I think that's part of the marvel of our Federal system that we have these options available to us.

Senator BURDICK. Proceed

Mr. WECKSTEIN. I call your attention particularly to the two surveys that I referred to where the reasons given for going to the Federal courts were: broader discovery, better judges, more current calendars, and superior juries. In the Virginia survey, where they separately queried the defendants' and plaintiffs' counsel, both parties and counsel agreed that the discovery rules of the Federal courts were

desirable, and a reason for going there, and the same was true of pretrial conferences and availability of third-party practice.

Senator BURDICK. There again, that's a matter that can be easily corrected. The Federal rules were established and many States are adopting very similar rules. This can be adopted nationwide. This can be standardized as far as the rules are concerned, but let's talk about jurisdiction.

Mr. WECKSTEIN. Justice Frankfurter once suggested that if we eliminated diversity jurisdiction lawyers could not run to the Federal courts for their more modern procedures. They would be forced to reform their State procedures.

I think the contrary is true. I think that the greatest obstacle to reform is lack of knowledge and fear based upon ignorance of what a new system would bring. By exposing the State lawyers to the Federal system, I think we have, in fact, increased the likelihood of reform of the State courts along the lines that you've suggested.

I would next like to comment on some specific provisions of S. 1876 as introduced. I will limit my comments to those provisions of which I disapprove, unless you ask otherwise. Section 1301(b)(3) continues a law adopted in 1964 which prohibits the invocation of diversity jurisdiction against an out-of-State insurance company in a direct action suit where the insured is a citizen of the same State as that of the plaintiff. I think it was a mistake to adopt this in 1964, and it's a mistake to carry it over in the present bill. In any true sense of the term, the real party in interest as recognized by the States which have passed direct action statutes, is the insurance company. The dispute is truly between the plaintiff and the insurance company and it should be their citizenship which determines whether the case comes into the Federal court or not.

I've already commented critically on the general philosophy underlying section 1302. I add only that a jurisdictional provision which prohibits a citizen of State A from suing a citizen of State B in the Federal courts located in State A but permits him to sue the same party in the Federal courts of State B, fails to, and I quote, "satisfy the untechnical requirements of ordinary common sense."

This quote is from the late Judge Goodrich, commenting upon a very similar situation on behalf of the Third Circuit in 1950. And I might add that Judge Goodrich formerly headed the American Law Institute, whose report furnished the basis for this bill.

Furthermore, the concept of local establishment for 2 years compounds the error just alluded to by creating yet another subclass of citizenship, the legal significance of which varies with the state of forum. It also sets up an authority classification and unnecessarily complicates the determination of jurisdictional questions.

Section 1302(e) broadens existing law to exclude all workmen's compensation cases from the Federal courts instead of just actions removed from State courts, as the present law reads. The 1958 amendment was intended to give the injured employee an option of suing in the Federal or State court on those workmen's compensation claims which are permitted by a few State's laws to be determined by court adjudication. I would retain this option with perhaps a refinement of existing law to make it even clearer.

Consistent with the principles I have previously articulated, I would extend diversity jurisdiction to make the Federal courts available almost to the full extent permitted by the Constitution (excepting principally the jurisdictional amount and other restrictions which are noted in my submitted statement). Thus, I would favor the addition of a provision expressly disapproving of the complete diversity requirement and substituting minimal diversity for all cases, not just interpleader and multiparty multistate actions, as the new bill proposes.

I would also eliminate the restriction on a citizen of a State removing an action brought against him in such State so that the provisions are mutual in that both parties, the plaintiff and the defendant, would have an equal opportunity to bring the case into a Federal court.

The Federal courts, and the constitutional and congressional draftsmen who framed their jurisdiction and procedures, have become victims of their own success because litigants, guided by their lawyers, have sought Federal court justice in increasing numbers, both in diversity and Federal question cases. The docket congestion has mounted in the Federal courts as well as in the State courts. The notion that diversity cases, since they involve question of State law, should be substantially curtailed has a definite surface appeal. But there are other values to be served, and these have been considered decisive by those who wrote and adopted the Constitution and the implementing jurisdictional statutes. And I might add, with the apparent support of the practicing bar and presumably those they represent, the people. These values, although changing somewhat in form and emphasis today, remain of significance and are reinforced by newly developed reasons to continue, and in some cases expand, the diversity jurisdiction of the Federal courts.

Senator BURDICK. Then you agree with your colleague, Professor Moore, that an in-State defendant should have a right to remove, too, then.

Mr. WECKSTEIN. I do, sir.

Senator BURDICK. Well, we have quite a range of thought in this very interesting subject, ranging from Judge Friendly to Moore and Weckstein.

As you know, Judge Friendly wants to junk it all—diversity as I understand it.

Mr. WECKSTEIN. Judge Friendly would also expand the federal common law and the Federal question jurisdiction to take up a large number of cases which are now brought to the federal court by way of diversity jurisdiction, as would Judge Skelly Wright, who, on balance, would keep diversity as well.

Senator BURDICK. Well, we'll try to balance it the best we can.

Except for the exceptions you noted, do you approve of the other provisions of the bill?

Mr. WECKSTEIN. I have some minor problems with some of them, but in general I think that the bill improves the current jurisdictional statutes.

Senator BURDICK. You state in your testimony that there is an appropriate inquiry for this subcommittee to examine the extent to which diversity jurisdiction should be provided, so you agree with that one.

Mr. WECKSTEIN. Yes.

Senator BURDICK. You stated that a Federal element is present whether it is the out-of-State party or the local resident who invokes the Federal court's jurisdiction.

Mr. WECKSTEIN. That is correct.

Senator BURDICK. The logic of this statement would seem to lead to a rule that a resident defendant should be permitted to remove his case to a Federal court, and you said that was correct.

Mr. WECKSTEIN. Yes.

Senator BURDICK. If the judicial basis for providing for diversity jurisdiction was to protect the outsider against local prejudice, why should a resident plaintiff be permitted to invoke diversity jurisdiction?

Mr. WECKSTEIN. Well, for one reason, as Professor Moore indicated, that may have been the traditional basis for diversity, but it may not remain the only basis, and I question, based upon a historical study which is reported in our Texas Law Review article, whether that was the only basis, even in 1789. Hamilton speaks of broader bases in the Federalist Papers, for example, and even in the 1789 Judiciary Act the Congress did not take away the option of the in-State plaintiff to invoke diversity in his own State.

Secondly, aside from the fact that local prejudice may not be the only current basis for diversity jurisdiction, it makes sense, I think, to give both the plaintiff and the defendant the same option to bring the case in Federal court, and it makes little sense at all to force the plaintiff who wants to sue in Federal court to go into the State of his opponent and sue in the Federal court there although he can't do so in his own State. This does nothing but improve the business, perhaps, of Mr. Moore's commuter railroads.

Senator BURDICK. But you don't deny that the local prejudice item was a basis.

Mr. WECKSTEIN. It certainly was.

Senator BURDICK. In your testimony—I'm referring now to page 3—you list a number of practices in the Federal courts which are not present in all State courts and which you view as providing a superior quality of justice.

Why should the Federal courts remain open to the resident plaintiff simply because he's suing an unresident party? He could never obtain the advantages of these procedures if he were suing a fellow citizen.

Mr. WECKSTEIN. Because as soon as we have a nonresident and a resident involved in the same litigation, we have the Federal element which was provided for in article III of the Constitution. And this is as much a part of our federalism as having State courts trying Federal question cases, which they do in most instances except a few in which the Federal courts have exclusive jurisdiction.

I think that since there is only that one tribunal, the Federal tribunal, to which both of the parties owe allegiance and which owes to them responsibility of administering justice, it is only fair to let either party, when the constitutional basis for jurisdiction in the Federal courts exists, invoke it.

Senator BURDICK. Well, let's take a case where the Red River separates North Dakota and Minnesota. On the west side of it is Fargo and on the east side is Moorehead, Minn. If there's an auto accident in Fargo, A can go into Federal courts because B is a resident of Moorehead because as you say there's perhaps superior justice over there.

Mr. WECKSTEIN. He has that option.

Senator BURDICK. But if B is a resident of Fargo, A sues B and he is denied the superior justice.

Mr. WECKSTEIN. I would let B remove the case, since there is a Federal element, diversity of citizenship.

Senator BURDICK. A and B both live in North Dakota.

Mr. WECKSTEIN. If A and B both live there, then unfortunately there is no constitutional basis for making the Federal courts available. I would not be reluctant to grant Federal court jurisdiction in such cases, but I'm afraid it would be unconstitutional under the present circumstances.

Senator BURDICK. With that statement, you're leading right to one court system in this country.

Mr. WECKSTEIN. Well, I suggest that the statement made by Judge Skelly Wright in this regard makes sense. He says: "Once we decide . . . that Federal justice is a valued and valuable service, no scruples need deter us from providing it where constitutionally we can; it happens we may provide it when citizenship is diverse." Just as we have used the taxing power and the Commerce clause for purposes of providing better, more effective, and more efficient laws on a national basis than could be done on a State basis, but only to the limits the Constitution permits. I think we can similarly use the diversity provision of article III.

Senator BURDICK. You referred to two empirical studies on the reasons lawyers choose Federal courts. Both of those studies seem to show that Federal procedures play an important role in choosing the Federal form. Is that right?

Mr. WECKSTEIN. That's correct, sir.

Senator BURDICK. Well, procedures can always be corrected, can they not?

Mr. WECKSTEIN. They can.

Senator BURDICK. In all State courts?

Mr. WECKSTEIN. I don't think it's within the power of Congress to correct them.

Senator BURDICK. But we've seen the growth of the Federal court rules being adopted in many State courts. That is something they can correct, but not the Congress.

Professor, you approve of section 1301(b) making corporations citizens of every State in which they are incorporated. Is that true?

Mr. WECKSTEIN. That is correct, sir.

Senator BURDICK. Do you approve of section 1301(b)(2) providing that a partnership is to be treated as a citizen of the State that is the principal place of business?

Mr. WECKSTEIN. Yes, I do, with the exception that the bill adds that the partnership or unincorporated association must be capable of suing or being sued as an entity in the State in which the action is brought. I think that goes to capacity to sue, which ought to be governed by rule 17, and should not be intermingled with jurisdictional considerations.

Senator BURDICK. And that's just the question of putting it in a different section.

Mr. WECKSTEIN. Right.

Senator BURDICK. And do you also agree that section 1301(b)(4) regarding the appointment of administrators will be helpful in avoiding the manufacture of diversity jurisdiction?

Mr. WECKSTEIN. This is a very difficult question, and one on which reasonable men could differ. I think that the most important thing here, though, is to have a clear guideline which will not be unfair in most cases, and I think that this legislation draws such a line.

Senator BURDICK. In other words, you look to the decedent or to the ward in each case relevant to the representative.

Mr. WECKSTEIN. That's correct.

Senator BURDICK. Are you in agreement with section 1304(b) which would allow removal by the defendant even when there is not complete diversity of all parties?

Mr. WECKSTEIN. Yes, I am.

Senator BURDICK. Then we agree on some sections of the bill, do we not?

Mr. WECKSTEIN. Several.

Senator BURDICK. We have a question from the staff here.

Mr. MULLEN. Professor, I would just like to explore with you a little bit this idea of the Federal element as being a key factor in invoking diversity jurisdiction. On page 25 of your article in the Texas Law Review you discuss this point and say that a "Federal element" exists in a diversity case simply because the parties being from different States, both owe allegiance to the Federal Government, and you say that this element is present whether it is the resident plaintiff or the nonresident who invokes diversity jurisdiction.

If we accept your premise—that the parties simply being from different states is the critical "federal element"—then obviously the option of diversity jurisdiction is for either party, but if you look back at the debate surrounding the original provision for diversity jurisdiction, it seemed to be to protect the outsider and the traveler. What authority besides your article is there for this allegiance theory?

Mr. WECKSTEIN. Well, first of all, we can look at the Constitution itself. Article III creates two categories of Federal jurisdiction, one depending upon the nature of the subject matter, the other dependent upon the nature of the parties. "Citizens of different States" is only one example of where jurisdiction is vested solely because of who the parties are, regardless of whether the questions arise under State, Federal, or international law. Others are, for example, where ambassadors or public ministers are involved or where aliens or foreign countries are involved. So that I think this Federal element is implicit in the constitutional provisions themselves.

Secondly, if you read the Federalist Papers by Hamilton, he places the diversity provisions on the same basis as the alienage provisions, to which the ALI seems to give a larger scope. He says both were necessary for the peace of the Nation. Now, the reason for that must be understood in historical perspective in that the States were actually engaged in combat with one another in certain areas of the country.

Rhode Island, which historically is one of the great States' rights States, passed an act which relieved in-State debtors of all obligations owed to out-of-State creditors. It was this kind of thing that the diversity provision was concerned with as well.

Also, historically, there is concern about protecting the investors and creditors from other States and encouraging them to invest their money.

Mr. MULLEN. But both of those examples, relate to the—to protecting the outsider, Hamilton's statement related to preserving the domestic tranquillity.

How can a resident party's dissatisfaction with the justice that he receives in his own State court be related to the constitutional purposes of diversity jurisdiction?

Mr. WECKSTEIN. While you may not see how he could be dissatisfied, the fact is that at least counsel for the resident party thinks that his client is going to get a better shake in the Federal courts. Now, what you're saying is that you will find it impermissible, along with the ALI, to permit that party to be dissatisfied. But in fact, he may have been active in citizen's conference on the courts which is trying to change State court procedures but hasn't been able to. Should he be denied the opportunity for a justice which he believes, whether or not we agree with him, is of a higher quality than is available in his State?

Mr. MULLEN. Yes, but again, isn't the purpose of providing jurisdiction—diversity jurisdiction is to insure an even level of justice for the outsider?

Mr. WECKSTEIN. I disagree that that was the only purpose, and I say even if that was the primary historical purpose, it need not limit us today. In fact, the ALI recognizes this principle in extending the diversity jurisdiction in cases where necessary parties to a controversy come from different States and cannot be served by the process of a single State court. As they recognize this is a new use of diversity jurisdiction which was not foreseen by the constitutional framers.

Senator BURDICK. Thank you very much for your contribution. The next witness is Professor Howard Fink of Ohio State University College of Law. Welcome.

Are you a co-author of Moore's Federal Practice?

Mr. FINK. Yes.

Senator BURDICK. Is that our friend Professor Moore that testified this morning?

Mr. FINK. The very one.

Senator BURDICK. Are you three all collaborators?

Mr. FINK. Well, in different senses of that word; yes. We don't fully agree on everything, though, although we are friends and collaborators.

Senator BURDICK. The first two seemed to agree.

Mr. FINK. Well, this may be.

STATEMENT OF HOWARD P. FINK, PROFESSOR OF LAW, OHIO STATE UNIVERSITY

Mr. FINK. I certainly appreciate the opportunity to be here today, and I thank you not only for hearing us but for giving us the kind of hearing we are receiving; one that's as informed and attentive as we are getting. I will offer my statement for the record and I will just try to highlight what I say.

Senator BURDICK. It's appreciated, and your entire statement will be made a part of the record, without objection.

(The document referred to follows:)

STATEMENT BY HOWARD P. FINK, PROFESSOR OF LAW, OHIO STATE UNIVERSITY

I appreciate this opportunity to appear before you in regard to S. 1876 which would make extensive revisions in the Judicial Code, Title 28 of the United States Code. While I believe that many of the changes proposed would be salutary, there are a number of provisions with which I would strongly disagree, and a number of others which should be called to your attention for particularly careful study.

S. 1876 is the product of a committee of the American Law Institute, an organization which has had a distinguished history in suggesting massive revisions, codifications and updating in many areas of American law. The study of the division of jurisdiction between the state and federal court system, upon which S. 1876 is based, was undertaken in response to an address to the Institute by then Chief Justice Warren. But despite its distinguished parentage and inspiration, the product of this study, I believe, contains many features which are unwise.

The most salient feature of the bill would limit the diversity jurisdiction of the federal courts by precluding an individual or business entity from instituting a diversity action in any state in which plaintiff resides or has a business establishment. The effect would be to shift some 11,000 cases which presently are brought annually in the federal courts to the state courts. The Institute provides no sound, practical reason for this shifting of cases. Instead it is based largely on a theoretical objection that the cases do not "belong" in the federal courts. The unstated major premise of the Institute's position is a scholastic antipathy to diversity jurisdiction, despite the fact that the United States Constitution and every Judiciary Act, from the very first in 1789 has provided for such jurisdiction in the federal courts. The Reporter admitted his presumption against diversity in the debates at the American Law Institute. [See 32 United States Law Week 2625.]

I cannot fully fathom the reason for this hostility but I surmise that it was strongly influenced by Professor, later Justice, Felix Frankfurter at Harvard Law School, and it is based historically upon a time when diversity jurisdiction was abused by some corporate plaintiffs. Prior to the famous decision by the Supreme Court in *Eric Railroad v. Tompkins*, 304 U.S. 64 (1938), the federal courts in some diversity cases applied concepts of substantive law which differed from that of the states in which these federal courts were sitting. Some corporations manipulated their state of incorporation to take advantage of this situation, giving them the choice of going to a federal court or a state court when they were suing residents of the forum state. But *Eric-Tompkins* largely eliminated this problem by holding that in diversity cases the federal court is to apply the same concepts of substantive law that the state court would in the state where the federal court is sitting. Yet even though this problem was eliminated, the hostility to diversity has gone on. Justice Frankfurter's position can be seen in his concurring opinion in *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48 (1954).

To me it seems that jurisdiction of any court, federal or state, is a morally neutral matter. Within the terms of the Constitution, jurisdiction should be apportioned as best to serve the public interest.

I have discerned no outcry from the bar stating dissatisfaction with diversity jurisdiction. Quite the contrary. At the American Law Institute meetings considering these proposals, representatives of the practicing bar were in general opposed to these changes. The reasons for this are manifold. The original purpose for providing for diversity jurisdiction in the Constitution must have been fear that some state courts would favor local residents over outsiders. To the extent that this fear may still exist in some litigants, the federal courts should remain conveniently open.

But today most litigants who come to federal court probably do not do so out of fear of state court prejudice but for positive features that federal judges and courts offer. The federal courts have judges with life tenure free from the shadow of political recall. It does not gainsay the quality of many state courts to assert that the federal bench has attracted men of a very high caliber indeed. The federal courts have a most progressive procedural system, found in the Federal Rules of Civil Procedure and in the Judicial Code itself. The procedure of many states lacks features common to federal procedure, such as a broad system of pre-trial discovery, as well as time-saving devices such as summary judgment and third-

party practice, simplified pleading and many others that attempt to foster speedy, fair, inexpensive settlement of disputes.

The stated purpose of this proposed reduction in diversity cases is to alleviate the overcrowded state of the dockets in some federal courts. No doubt the subtraction of 11,000 cases would lighten the workload of the federal courts. But where would these cases go? Of course to the state courts. In some instances, particularly in many metropolitan centers, these cases would go to courts having even more crowded dockets than the federal court for those districts. *Thus instead of speeding up the process of settling legal disputes, the result would be in the opposite direction.*

Of course the caseload of the federal courts would be lighter without these additional diversity cases. But would this be the most efficient solution to the problem of congestion? The cases will have to be tried somewhere. Broad taxing power gives the federal government the wherewithal to handle an increase in caseload much more readily than some financially overburdened states. Moreover, the federal court system has a statutory basis for assuring the most efficient use of the totality of its judicial manpower. The Judicial Code provides for the transfer of judges from one court to another. Federal district judges can be assigned to the courts of appeals, and judges of the courts of appeals can be assigned to the district courts to help in situations where there is a particular need. More importantly, district judges can be assigned temporarily to a federal court in another state to help reduce a crowded docket. This of course cannot be done at the state-court level. Moreover, through the Administrative Office of the United States Courts and the Federal Judicial Center, the most advanced personnel and computer techniques are being used to enhance the efficient utilization of federal judicial manpower. Thus the federal courts may be more able to cope with expanded dockets than some states.

What cases would be eliminated from the federal courts and transferred to the states by S. 1876 in its present form? Largely they would fall into two categories. The first would be cases arising out of automobile accidents. These in fact are a prime source of civil cases in both the state and federal courts. But is reduction of federal jurisdiction the best answer to this burden? We are just now moving toward a better solution. States are enacting, in different forms, "no-fault" automobile liability statutes that would take many, many cases out of the courts, as has been demonstrated by the short but dramatic experience so far in Massachusetts.

The second category of cases which would be eliminated are those brought by corporations. These corporate cases are often complex and involve great sums of money. The corporate plaintiffs trust the quality of justice they receive in the federal courts—the integrity of the judges, their ability to understand and apply the law to complex fact situations, as well as the procedure which these courts apply. Who is harmed thereby, whether the defendant in the case is another corporation or private individuals? I suggest that no one is. The system is working well and should be left alone. I would therefore respectfully suggest that those parts of S. 1876 which would reduce the diversity jurisdiction of the federal courts be eliminated.

Even if they are not eliminated, the workings of some of these amendments to the diversity jurisdiction ought to be carefully scrutinized. For example, § 1302(b) (1) keys the restriction on institution of diversity suits to corporations or other business entities which have maintained a "local establishment" in a state. Specifically excluded, and therefore able to invoke diversity are those out-of-state business enterprises that deal through an "independent commission agent, broker, investment, or other business enterprise". Will this not breed reliance on the facade of brokers in order to preserve entrée to the federal courts reminiscent of the situation which existed before there were broadened concepts of personal service when corporations sought to remain outside of a state by various similar stratagems and subterfuges? In any event it will breed litigation testing whether the enterprise has an "establishment" in the state.

With regard to the commuter, covered in § 1302(c)—if a man resides in New Jersey but works in New York he could not institute a diversity action in New York. Section 1302(c) thus forces him to go to a less convenient place if he is determined to go to federal court, thereby discouraging but not prohibiting him from using the federal courts in his case. Should he be forced to this choice? I would say no. At the least, therefore, I would not apply the section to individual plaintiffs.

Section 1302(d), first, keys diversity to the time the cause of action arose rather than the time federal jurisdiction is invoked. This would alter the present law which looks to the situation of the parties at the time they come to federal court. Where the parties live *now* rather than where they lived at the time the cause of

action arose is much more easily proved. This change is unnecessary and again would breed appeals.

The second part of § 1302(d) deals with the situation where a representative of an estate or other interest has been appointed in order to create or avoid diversity jurisdiction. This matter is presently handled adequately by recent judicial interpretation of § 1359 of the Code. So there would be little net change here, except in one area. Section 1302(d) would eliminate the *avoidance* of federal jurisdiction by choice of a representative—thus *increasing* federal diversity cases.

While § 1305(a) corrects a difficulty in the application of present § 1404(a)'s provision on transfer to a more convenient forum, and would allow transfer of a case to any other district, in the interest of justice, § 1305(b) unnecessarily beclouds this reform by importing new restrictions on transfer necessitated by consistency with the preclusion on instituting a diversity action in one's own state found in § 1302. If § 1302 is modified as I have suggested above, § 1305(b) should be eliminated.

The changes in Federal question jurisdiction which S. 1876 would bring about would be as helpful as the reduction in diversity would be unhelpful. The best feature would be the elimination of the jurisdictional amount in general federal question cases provided for in § 1311(a). Dealing with federal question removal, § 1312 sets up a dichotomy between removal based on a federal question in plaintiff's claim, for which no jurisdictional amount would be needed, and removal based on a federal defense in defendant's answer, for which more than \$10,000 in controversy would be required. Removal based on defendant's answer represents a great advance; whether this removal should be limited by an amount in controversy presents a very close question which should be carefully studied before enactment. I would tend to favor no jurisdictional amount with the possibility of adding one at some later time if abuses by lawyers devising answers containing spurious federal questions becomes common.

Section 1312(d) also overrules an unfortunate judicial doctrine by providing that a case within the exclusive jurisdiction of the federal courts mistakenly brought in a state court can properly be removed to the federal court.

I question whether in § 1315 there should not be a reference to law applied upon transfer of a federal question case equivalent to the law-applied reference upon transfer of diversity case in § 1306(c). Federal question cases sometimes also involve matters of state law; to the extent they do, the principles of the *Van Dusen* case upon which § 1306(c) is based should also apply to transferred federal question cases.

One of the most undesirable provisions of the entire proposed Act is § 1371. This would place the doctrine of abstention, which has evolved in numerous and controversial decisions of the Supreme Court into an oversimplified and potentially harmful statutory form. The circumstances in which the Supreme Court has required the district court to refrain from adjudication of a case otherwise within its jurisdiction are complex and constantly evolving. When it is applied, the doctrine of abstention is costly and time consuming. Some trends in recent decisions of the Court are toward narrowing the applicability of the doctrine. It may be that future decisions would modify, narrow, or clarify the application of the doctrine. Therefore it is very unwise to freeze abstention into a statutory mold. But beyond that, § 1371 may even be a step backward from present doctrine, particularly in the area of personal liberty. Section 1371(g) does create an exception to the abstention doctrine in voting rights or equal protection cases *based on race*. However, while not precluding abstention the Supreme Court in at least two cases has indicated that abstention is less appropriate in voting rights and free speech cases, without regard to racial discrimination. See *Harman v. Forssenius* (1965) 380 U.S. 528, 537 and *Zwickler v. Koota* (1967) 389 U.S. 241, 252. If § 1371(g), by expressly precluding abstention in racial discrimination suits, is thought to be an abridgement of the statements in *Harman* and *Zwickler*, this would undercut an area of concern expressed by the Supreme Court for the protection of personal rights that could be abridged by the delay caused by abstention, an unsound step indeed. If § 1371(g) is to be adopted, at the very least the reference to discrimination based upon race, etc. should be eliminated.

Section 1372 unnecessarily precludes a federal district court from enjoining a fraudulently-obtained state-court judgment, an ancient and useful equitable remedy. While there is a split in authority as to whether under present § 2283 a federal court has such authority, the better view is that it does. See *Moore's Federal Practice* (2d ed) ¶¶0.226, 60.39[2]. Moreover a desirable reform which § 1372 should but does not make would be to allow a federal court injunction where a state court has taken jurisdiction over a matter which has been committed to

the exclusive jurisdiction of either the federal courts or federal administrative agencies. This would overrule the decision of the Supreme Court in *Amalgamated Clothing Workers v. Richman Bros. Co.* (1955) 348 U.S. 511.

Section 1376(a) is a desirable codification of the practical reality of recent Supreme Court decisions that the court of appeals rather than the Supreme Court is the appropriate court in which to seek review of a district court order refusing to convene a three-judge federal court or dissolving such a court once it has been convened.

Section 1386(a) is a needed reform which would generally limit the dismissal of an action for lack of federal jurisdiction after trial has commenced in the federal court. Section 1386(b) would toll the running of a state statute of limitations if an action had been commenced in federal court within its time limit but then dismissed for lack of federal jurisdiction. While this would be a very desirable provision, the constitutional question raised by federal statutory interference with a matter of state law must be faced. Though I believe the provision to be constitutional, the matter is far from certain. Less constitutional difficulty would be occasioned by § 1386(c) dealing with the obverse situation—an action timely commenced in state court but dismissed because its subject matter has been exclusively granted to the federal courts. Here the federal statute would be dealing with a federal matter, not a right created by state law, even though a state statute of limitations might be applicable by reference.

Finally, I turn to the sections which would create a new area of federal jurisdiction, actions involving dispersed necessary parties. I have advocated such a reform. See Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 Yale Law Journal 403 (1965). The foundation of this jurisdiction is so-called minimal diversity—so long as any two opposing parties are diverse the federal court would be given authority over an action where personal jurisdiction over all the parties needed for just adjudication could not be obtained in any one state. We need such federal jurisdiction; but I believe §§ 2371–2376 are unnecessarily complex. Section 2371(a) postulates jurisdiction where there are parties needed for a just adjudication “not all amenable to the process of any one territorial jurisdiction”. Yet § 2373(d) talks of only a reasonable effort having been made to secure such jurisdiction. And § 2374(d) says that some parties who would otherwise be necessary for a just adjudication may be dispensed with in the discretion of the court. Are these inconsistent with § 2371 which contains no exceptions for hardship? I would think that the language of § 2371 ought to be amended to say that its procedure may be used so long as reasonable diligence has been used to secure as many parties as would be required by the court to render any just decree. If they cannot be served by reasonable diligence under existing state law and federal provisions, that should be enough to trigger § 2371.

Section 2374(c)'s provision dealing with conflict of laws, leaving the choice of law in dispersed parties situations to be determined by the district judge, seems to me to conflict with the case of *Klaxon v. Stentor Co.* (1941) 313 U.S. 487, and might therefore unnecessarily raise constitutional problems.

In sum, there are many desirable provisions in S. 1876, and some which I respectfully suggest should be modified or deleted. If the diversity reduction provisions were eliminated, the rest of the provisions could be handled with some minor amendments to presently existing statutes without revamping the entire structure of federal jurisdiction. The remaining changes simply do not warrant the confusion that a complete recodification would entail.

BIOGRAPHY

Name: Howard Fink.

Present occupation: Professor of Law, Ohio State University, since 1967, associate professor 1965–1967.

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Previous affiliations: Visiting Professor of Law, University of Illinois, 1970-1971 and summer of 1971; Research Associate, Yale Law School, 1963-1965; Special Assistant to the Judicial Conference Advisory Committee on Rules of Evidence for the Federal Courts, 1963-1965; Research Assistant, Yale Law School, 1958-1961.

Mr. FINK. Thank you, sir, and I'll try to point out what page I'm talking about so you can follow, but I won't read it.

We are up against distinguished opposition here. The American Law Institute has had a fine record in codifying and stimulating changes in various areas of the law. This study that we are dealing with today was in response to a speech of Chief Justice Warren to the American Law Institute. But, I suggest, despite its distinguished parentage and inspiration, there are some things wrong with the study, some things that are good about the study, and I simply would not endorse it in whole or reject it in whole. I hope that the committee would take this same approach and give it the scrutiny that it demands.

In response to one of the questions that was asked before, I think it's part of the genius of our society that we have competing solutions—competing institutions in this country to deal with the same problems. So we have a Federal Government and State governments and State and Federal courts, and they inevitably will compete. No matter where you draw the line there's going to be competition.

Now, as I say here toward the end of page 1, that the most salient feature of the bill is that it would greatly reduce Federal court jurisdiction in the diversity area, and as I understand this is the primary purpose of the hearings today, I will largely confine my remarks to that subject.

What the bill would do would be to take about 11,000 cases from the Federal courts annually.

Senator BURDICK. Where did you get that estimate?

Mr. FINK. That's in the ALI study. That's their estimate in their committee notes. They estimate that approximately 11,000 cases would be eliminated nationally.

In fact sir, I got it from the statement you sent from the Congressional Record.

Senator BURDICK. I was just trying to separate the cases filed from the cases tried; 83 percent of the cases filed are not tried.

Mr. FINK. Yes, sir.

It seems to me that the philosophical objection that the Institute makes is based on the notion that these cases don't "belong" in Federal courts, whereas prior witnesses have said there's a constitutional basis for these cases but that we're not too sure from whence it arose. There is almost no debate recorded in the constitutional conventions hearings for this diversity grant.

My point is that the diversity grant has been working well.

I believe we've heard almost no outcry from the bar complaining about the present distribution of power here, nor from litigants. In this day when so many institutions in our country are not working very well, one of the few things that seems to be working and getting the job done satisfactorily to the people who are using it, to the consumers you might say, is the Federal court system.

Now, I think the basis of the opposition of people such as Professor Field, Professor Wechsler, and Judge Friendly, goes back to the influence of the late Justice Felix Frankfurter who was their teacher

and colleague, and a great Justice of the Supreme Court. This opposition to diversity jurisdiction, largely goes back to a time before *Erie v. Thompkins*, to the situation that you alluded to before.

Before *Erie v. Thompkins* a corporation could have abused the diversity jurisdiction, but as you suggested, *Erie* has largely solved this problem; yet the antipathy to diversity—which Professor Field admitted in the hearings—has remained. He said, “my presumption is against diversity,” which is a permissible feeling, but I think that I would say, as I do on the top of page 3 here, to me it seems that the jurisdiction of any court, Federal or State, is a morally neutral matter. What you’re talking about is trying to draw a just line, a workable and simple line between the two kinds of jurisdictions, and I think basically we have that today.

So I would keep tampering with this to a minimum. I think that most litigants who come to Federal courts largely come there either because of the fact that the judges have life tenure and are free from the shadow of political recall, or because of the procedure of the Federal courts. This procedure has become the model for many States, and I think the diversity jurisdiction has brought lawyers into the Federal court, and has encouraged this, you might say, from the competition between the Federal courts and the State courts to provide the best procedure.

I think it’s this contact that has encouraged many States to adopt parts of the Federal rules dealing with matters such as summary judgment, broadened discovery, pretrial conferences. These things were initiated in the Federal rules and they have been adopted in many of the States.

If you close off the diversity jurisdiction to these lawyers, as you will for many, if not most lawyers, you’d be closing the Federal courts to their day-to-day contacts. I think the spirit of competition and being able to function in both Federal and State courts has enhanced jurisprudence in this country, so I would hesitate to tamper with it. Now, these 11,000 cases. What are they? What kind of cases are they?

I suggest largely they fall into two categories that would be eliminated. Cases involving automobiles are perhaps half of them. Now, I don’t think these automobile cases ought to be in any courts. They are crowding the dockets in the Federal courts and the State courts, and I think just at this point in time we are seeing the light at the end of the tunnel to solve this problem—through the no-fault insurance. That has—

Senator BURDICK. Right here you part company with the American Trial Lawyers, don’t you?

Mr. FINK. To some extent I part company with my colleagues and to some extent with my allies. The point is, I think we’re going to see a reduction in automobile cases, whether we agree with no-fault or not. In Massachusetts, for example, there has been a dramatic downturn in the cases in the courts since the adoption of no-fault insurance. I suggest this will inevitably cut dockets in Federal court.

Second are cases brought by corporations. Now, there are varying reasons why a corporation would want to come to Federal courts, and it may be that they’ve had the assumption that if they could go to Federal courts they are safe in investing in areas of the country with which they are not familiar. They always know that should something happen they have the opportunity to go to Federal courts

to protect their investments, where they will get a uniform brand of justice. We don't know what would have happened had this opportunity not been there, nor what would happen if it's taken away. All we know is that we've had it from the beginning and it's worked and the corporations that bring these cases—they often are complicated and expensive—seem happy and satisfied with it. No one seems dissatisfied.

So I suggest that this may not be the wisest way of dealing with this problem. Moreover, if you cut these cases out of the Federal court, obviously they're going to have to go somewhere. They'll go to State courts.

It means, particularly in metropolitan centers like New York and Chicago and others, they will be going into State courts where the dockets are even further behind than the Federal courts. So if what you're worrying about is speeding justice, very often you would be impeding justice by taking these cases out of the Federal court and putting them into the State courts.

So I would suggest we concentrate not on doctrinal reasons that are very hard to document, but on the practical reality that we've got these Federal courts that are working well; we've got these judges. I haven't heard of many judges who have died of overwork. They seem to be able to cope with their dockets and if we need more Federal judges, we can get them.

Moreover, there are certain practices in the Federal courts that Congress has provided for that make it more possible for Federal courts to deal with increased dockets than the State courts. There are provisions for transferring Federal judges from one State to another. You've got the Administrative Office of the U.S. Courts. This provides computer and management specialists to deal with utilizing judicial manpower in the best way possible.

So then if you're talking about, say, 10,000 or 11,000 cases, where it's better to have these cases, as a practical matter, the Federal courts, with the devices they have and the taxing power they have, can cope with an increase in dockets more than many State courts could.

So for those practical reasons, I suggest that it would be unsound to take these cases out of the Federal courts for some mere scholastic argument that they don't "belong" there. It isn't harmonious to preclude a defendant from removing from his own State but to allow a plaintiff to institute suit in his own State. It isn't symmetrical; I'll grant you that. But a lot of things in this country aren't symmetrical, but they work.

Senator BURDICK. What is your view on the in-State defendant?

Mr. FINK. Well, I suppose, if I could create the system, I would allow the in-State defendant to remove as well, but I'm satisfied with the system as it is now. We are in a stasis; we are in a balance now. It may not get the best balance that one can imagine, but when you change the balance, it's going to have practical effects. I don't think that the practical effects would be good.

Surely, I could erect a different system, but I'm willing to accept the system that we have now.

The jurisdictional amount—and here I part company with Professor Moore—I would leave alone except in the Federal question area where you have a provision that, I think, is quite good.

I would basically not have this change in diversity, particularly with regard to corporations. Now, the analogy is not exact between an individual and a corporation. A corporation doesn't exist anywhere. You say, alright, the commuter should not be able to go across the river to where he was injured and sue in Federal court there.

One answer to that is that the commuter is not, by your bill, precluded from suing in the Federal courts. He's only precluded from suing in the Federal court where he works. If he went to a Federal court in a third State then he could sue. All this provisions says is that the person shall not sue in the Federal court in the place where he has a place of business. He, as an individual, can go to a third State and sue in the Federal court against a corporation from a different State that has its principal place of business in a State other than his own State.

So you're not precluding the commuter—you're just requiring him to go to a third State. I suggest this is ridiculous. It's ridiculous to force him to go further from home if he needs or wants to go to Federal court than to let him sue in the Federal court where he lives or works. You're not cutting him out of the Federal courts; you're cutting him out of the Federal courts in his own State or in the State where he works.

So this, it seems to me, is unnecessary; at the very least, I would take the individual part out. I would take the commuter part out. As for the corporation, I suggest that you're going to get the courts into unlimited disputes as to what is an "establishment." When there was a question about personal jurisdiction, before the extension of service of process through long-arm statutes, many corporations tried to avoid being subject to service of process by a fictitious arrangement. They would have a broker do their business who would be sent in, for example, with one shoe rather than a pair of shoes to make sure that the corporation was not technically completing a sale in the State. But of course, it was.

I suggest that you're going to get into the same thing when you say that a corporation can stay in the Federal court if it doesn't have an establishment in that State, but if it deals with a broker, it can sue.

Well, you don't have to go far to imagine that corporations are going to have various subterfuges that are going to create litigation that's going to get around this provision.

So I would suggest that the elimination of diversity as to individuals is unwise, and further, this very complex set of provisions dealing with corporations, who could not sue in places where they have establishments, is equally unwise in creating litigation.

That takes me through page 6 of my presentation, and now I would just like to concentrate on a few of the provisions themselves.

Senator BURDICK. I think that might be a good place to make our division for today, so we will return at 1:30.

(Whereupon, the subcommittee hearing recessed at 12:30 p.m., to reconvene at 1:30 p.m. the same day.)

AFTERNOON SESSION

Mr. FINK. I think I've covered my objections to 1302 (a), (b), and (c), and I would urge you to delete these provisions from the bill. Section 1302(d), which I cover on the bottom of page 6, I suggest,

first, changes the time when one measures diversity. Presently, the law is that diversity is measured at the time that the plaintiff commences his action in the Federal court. Section 1302(d) would change this to measure diversity at the time the cause of action arose. And I suggest this is a harder time, when you're going back to an earlier day, to measure where people lived than measuring where they now live when they come to court. Where someone lived at an earlier time is much more difficult to prove, I think, than what his residence is today.

So I suggest that this change doesn't accomplish very much and it's probably key to other parts of section 1302, made necessary by this great emphasis on where a business establishment is located and where a commuter lives and works. If the other parts of 1302 were eliminated, this part of (d) would be unnecessary.

Over on the top of 7, the second part of 1302(d) deals with a subject that has already been corrected by most of the courts of appeals. That is, by interpretation of the present section 1359 of the Judicial Code to preclude someone from choosing a representative of an estate to create diversity jurisdiction.

I want to point out that 1302 also precludes someone from choosing a representative to avoid diversity. Now, this would have the effect of increasing Federal jurisdiction rather than reducing it, and I just point that out for your consideration.

A more fundamental objection is to section 1305(a). That section starts out to correct a very important difficulty today in the transfer provision § 1404(a), changing the wording of this provision for transfer to a more convenient forum. Transfer today can only be made to a district where the action "might have been brought."

It's very difficult to interpret what that means. The Supreme Court has largely interpreted it to mean to a district where venue and service of process could have been obtained at the time the action was brought.

1305(a) now eliminates that and says transfer may be made to any district where it's convenient to hear the case.

I think 1305(b) takes back some of this convenience by precluding transfer to a district where initiation of the suit would have been precluded by section 1302. So if 1302 were eliminated, then this part of 1305(b) could be eliminated also.

So I think those two things should be considered together. It's rendered unnecessarily complex by the necessity of making it in parity with section 1302.

I would now briefly allude to the proposed changes in the Federal question jurisdiction. I understand you're going to have separate hearings on that. I would just point out that as a general matter, these proposals are to me as desirable as the diversity reduction is undesirable.

I would just suggest that some of these particular provisions be carefully studied.

Section 1312(d) applies both to diversity and Federal question jurisdiction. This is on the top of 8. And this does do a positive thing. It overrules the unfortunate doctrine that one can wait until after the case has gone to trial before objecting to Federal jurisdiction: 1312(d) would preclude that and say that once a case has gone to trial, unless this fact has been hidden, it's too late to object to lack

of Federal jurisdiction, whether it is Federal question or diversity jurisdiction that that one is speaking of.

Now, in section 1315, I question whether there should not be a reference to law applied upon transfer of a case where the transfer is based on Federal question jurisdiction just as where section 1315 now deals with transfer with regard to diversity.

In other words, section 1315 should be made consistent with 1306(c). Sometimes a Federal question case also involves questions of State law. To the extent that it does, upon transfer, the principles of the *Tan Dusen* case upon which section 1306(c) is based should also apply to transferred Federal question cases.

Now, I point out for your attention my strong objection to section 1371 dealing with abstention. I know this is going to be the subject of a later hearing, and I hope you will study that particular provision with great care. It codifies Federal law in a way that is not only unnecessary, as there is evolving judicial doctrine here, but the changes that it makes in Federal law, which I pointed out on the top of page 9, actually cut back on the preclusion of abstention that is probably encouraged by present Supreme Court decisions in the area of civil liberties, whether or not based on matters of racial discrimination.

Section 1371(g) makes an exception to abstention only in racial discrimination cases. I think the words "racial discrimination" should be eliminated in section 1371(g).

Section 1372 unnecessarily changes present section 2283. It precludes a Federal court from enjoining a fraudulently obtained State court judgment. I think that goes in the opposite direction that it should, and on the other hand it does not overrule the *Amalgamated Clothing Workers* case, which precludes a Federal court from enjoining a State court that doesn't have jurisdiction in a case.

Section 1376(a) deals with three-judge courts, and I think this is largely a good provision, in accord with present law, if we are going to keep three-judge courts. I have some question as to whether the utility of three-judge courts is worth the time and effort that they take.

As I have said, section 1386(a) deals with limiting the dismissal of an action for lack of Federal jurisdiction after trial has commenced. But section 1386(b) would toll the running of a State statute of limitations. In other words if plaintiff came to Federal court wrongly, he came and there wasn't jurisdiction and the case was dismissed, 1386(b) would say the State statute of limitations has not run.

I think this is a good provision, but it raises some constitutional objections as to whether the Federal Government has the authority to legislate in the area of State statutes of limitations, which have been interpreted by the Supreme Court to be areas of State substantive law.

Senator BURDICK. The first part of your statement there bothers me somewhat because I was of the opinion that jurisdiction could be raised at any time.

Mr. FRANK. That is the case today, sir. What 1386(a) would do would be to change that and say that once the trial has commenced, jurisdiction cannot be objected to unless the factors have been hidden from the parties.

And finally, I turn to the sections which would create a new area of Federal jurisdiction, actions involving dispersed necessary parties. And I'm very much in favor of this general idea, as I have indicated in the article which I wrote, which is cited here on the bottom of page 10. As we know, the foundation for that jurisdiction is minimal diversity. Minimal diversity to support dispersed necessary parties jurisdiction just as we have minimal diversity for interpleader today.

However, I think sections 2371 through 2376 are unnecessarily complex. 2371(a) postulates this dispersed parties jurisdiction on the proof that there is no place in the country where all of the necessary parties could be served. That's going to be very hard to prove. It's very difficult to prove a negative.

But then, inconsistent with this, 2373(d) talks only of a reasonable effort having been made to secure such jurisdiction, for removal purposes, and 2374(d) says that after one of these dispersed parties cases has been started, the Federal judge can dismiss some parties who would otherwise be necessary for a just adjudication. I suggest this is the way 2371(a) ought to be worded, that a reasonable effort should be shown to have been made to get these dispersed parties in. If that has been shown, then that should be enough to trigger this dispersed parties jurisdiction, particularly if there are some of these parties who are not indispensable. That is when the judge should make the decision.

So I suggest that that should be studied.

And then 2374(c), in the proposed bill, says that in these dispersed parties situations, the judge shall decide what is the applicable conflict-of-laws rule. This, I suggest, conflicts with the *Klaxon* case decided by the Supreme Court, and it raises the same constitutional question, whether Congress has the power to legislate an area that has been interpreted by the Supreme Court as State substantive law, as would the statute-of-limitations rule.

I call that to your attention, and I would conclude by saying that, as I pointed out, there are many desirable provisions of the bill, and others which I respectfully suggest should be modified or deleted.

Now, if the diversity part of it is deleted, then I don't think you need the very complicated codification that you have in the proposed bill. The good parts can be done by amendments to various present Federal jurisdictional statutes without saying we're going to tear the whole thing up and start over again. The original numbers of the jurisdictional statutes should be retained.

I think that would be unnecessarily confusing, and much of the confusion is caused by making all of these changes to be consistent with the diversity reduction provisions.

I thank you.

Senator BURDICK. Thank you very much for a good statement. I think you've analyzed the problem very well.

I'm not clear as to whether you're going to place the in-State defendant in the same situation as the in-State plaintiff.

Mr. FINK. Frankly, I'd rather not take a position on that, but I'd say if I had to make the rule, I would allow the in-State defendant to remove, but that isn't the law today. It hasn't been the law since 1877.

Senator BURDICK. Well, dealing in this subject, now, which do you recommend?

Mr. FINK. I would recommend that if a change is to be made, it should be in the direction of enlarging the right of removal, though if there were a choice of reducing diversity jurisdiction or staying the way we are, I would prefer, of course, to stay with the matter as we have it today.

Senator BURDICK. You haven't answered the question. Are you recommending that the rule now with regard to an in-State defendant—

Mr. FINK. It would be to extend it to in-State defendants and allow them to remove; yes.

Senator BURDICK. You say in your statement on page 3 that jurisdiction should be "apportioned as best to serve the public interest." This, of course, is the ultimate question that Congress must decide. Isn't that what we're attempting to do?

Mr. FINK. Yes, sir.

Senator BURDICK. Isn't the preservation of a strong and efficient dual court system more in the public interest than the availability of an optional forum for the trial?

Mr. FINK. Yes; and I think that these are not mutually exclusive. I think to the extent that we have this access for diversity, we're actually strengthening the State courts as well as the Federal courts, because the lawyer who has to be prepared on Federal procedure as well as State procedure is the man who comes back and says, "Why don't we try here in the State courts something that has been working in the Federal courts?" and conversely makes the same suggestion with regard to the Federal courts. But the effect of the bill would be to take out most lawyers who ordinarily come to Federal court only because of diversity cases, take their counsel away from Federal courts as well as taking it away from the State courts in the sense that they would have been familiarized with the situation and innovations in the Federal court and also in the State courts.

After all, it's no accident that half the State courts have adopted the Federal Rules of Civil Procedure. I suggest they would not have done so were it not for the fact that the lawyers were made familiar with Federal procedure by diversity cases.

There just aren't that many Federal question cases, and they tend to go to specialists, whereas the diversity cases go to generalists.

Senator BURDICK. You'll have to agree that it's easier for the federal system to develop a set of rules, than it is for 50 separate jurisdictions to develop a set of rules, so that's probably why it developed faster.

Mr. FINK. There are some things in some State procedures that are better than anything that we have in the Federal court, but it's this contact which I suggest is so healthy.

Senator BURDICK. I think you will agree that this option that you are referring to is often exercised for strategic and technical advantages under the shopping theory that I mentioned awhile ago.

Mr. FINK. I will agree that that is the case, and I think there are two things to be recognized, that one, in Erie-Tompkins, the largest of these shopping problems, with regard to substantive law, was eliminated; two, the fact is that once a plaintiff comes to Federal court, both parties have the benefit of the detriments of Federal procedure.

The discovery rules apply equally to plaintiff and defendant, summary judgment can be given for the plaintiff or defendant, and so on. So I just rather object to the notion that even though a choice

is made as a tactical choice, this tactic can lead to favoritism toward one party or the other.

Senator BURDICK. Isn't that why we had diversity in the first place? The stranger wasn't treated properly?

Mr. FINK. To the extent we know, I think that the main reason was the fear that there would not be an investment in what today we might call the equivalent of underdeveloped countries, underdeveloped parts of the country where the investor from a foreign part of the country, from the east, let's say, investing in the west, was fearful that his investment might be subject to local pressures.

Senator BURDICK. But that might apply to corporations, but not citizens.

Mr. FINK. It certainly would apply more to corporation parties than to citizens.

Senator BURDICK. Wasn't the basic, underlying philosophy of the diversity that a stranger might not get the same deal as a resident?

Mr. FINK. I suppose that, if you had to choose one reason, that would probably be the most historically accurate, but we are a pragmatic people. If something works, it doesn't matter that it works despite its original historical assumption; what matters is that it works.

Senator BURDICK. That's a question before this committee, whether it works properly.

Mr. FINK. Yes; and I suggest that it has worked, and it is working now pretty well.

Senator BURDICK. Do I understand from your statement that you support no-fault insurance in liability matters?

Mr. FINK. I'd rather not have the wisdom of what I have presented, if it be that, to depend on—

Senator BURDICK. As I recall from your testimony, you were quite favorable.

Mr. FINK. What I said was, I think the effect of no-fault insurance would be to cut down on cases in both Federal and State courts, and I think that has been demonstrated. Whether the other effects of no-fault insurance are good or bad is largely for State legislatures and the Congress to decide, but I think it is demonstrated it cuts down on cases, and if it were adopted generally, many of these 11,000 cases just aren't going to be in court if no-fault insurance becomes prevalent, but it won't become prevalent to protect the Federal courts. That would be a byproduct.

All I suggest is that maybe this is the wrong solution at the wrong time. We may be seeing the dockets of automobile cases cut by no-fault insurance whether we like no-fault insurance or not, or whether this bill is passed or not.

The main point that I'm making is we have a certain number of cases. These cases are not going to go away, whatever court they are tried in. It's really a question of whether we leave the option of Federal court open or not.

Senator BURDICK. Do you have a guess as to what percentage of your diversity cases might be based on negligence in automobile cases?

Mr. FINK. I think the estimate is close to one-half.

Senator BURDICK. Then if no-fault became a national policy, half our business would fade away.

Mr. FINK. Well, half of a half, which would be a quarter. In other words, if negligence is half the diversity cases, and half the negligence cases were eliminated by no-fault, then you'd have a one-quarter reduction.

Senator BURDICK. Didn't you say that half the——

Mr. FINK. Half the diversity cases are negligence cases. They are not all automobile cases and not all automobile cases will be eliminated.

I think maybe there's also frankly a flaw in what I say in that, as the no-fault insurance is generally structured, there would be a right to sue the other driver where damages are more than \$10,000, and of course you need that for the jurisdictional amount today.

So I'm only talking about an indirect effect in regards to no-fault insurance, and I want to be absolutely frank about this, that I don't think no-fault insurance will cut down on Federal dockets as much as it will cut down on State dockets because to get to Federal courts you've got to be over the limit, that is, you'd have a right to sue on the basis of damages of more than \$10,000.

Senator BURDICK. The only question, then, would be damages; wouldn't it?

Mr. FINK. That's right.

Senator BURDICK. Thank you very much.

Prof. William VanDer creek, Southern Methodist School of Law Dallas, and Florida State University School of Law, Tallahassee.

STATEMENT OF PROF. WILLIAM VAN DERCREEK, SOUTHERN METHODIST SCHOOL OF LAW, FLORIDA STATE UNIVERSITY SCHOOL OF LAW

Mr. VANDERCREEK. Thank you. I am now a professor at Florida State, having been a professor for some time at SMU School of Law for which I have a very fond affection.

If I may, I would like to proceed in the fashion of assuming that my statements have been dictated into the record and merely make some comments and observations on the factors of which my viewpoint may be somewhat different than my predecessors before this committee.

Senator BURDICK. Inasmuch as the bell may ring at any time and we would like to finish by 3, this suggestion is most welcome, and your entire statement will be made a part of the record.

(The document referred to follows:)

PROFESSOR VANDERCREEK'S STATEMENT ON CHANGES IN DIVERSITY JURISDICTION

Professor William VanDer creek has been active as a teacher, writer and practitioner on matters relating to Federal Jurisdiction for the past 14 years (including one year as a law clerk to a Federal Circuit Judge). He is currently a Professor at the College of Law of Florida State University.

The American Law Institute proposals and the Senate Bill as now drafted would effect a drastic curtailment in diversity jurisdiction. Although the A.L.I. proposals and the Senate Bill under consideration embrace broad and, to some extent, interrelated changes in federal jurisdiction, the comments in this statement will be limited to the diversity aspect.

Perhaps matters can best be placed in proper perspective by recognizing two factors. First that the basic reasoning behind the curtailment of diversity is to alleviate the docket congestion that exists in crippling form in many districts. This purpose is fully acknowledged by the American Law Institute study.* Second, even though diversity jurisdiction is provided for by the Constitution and

has been with us since 1789 the American Law Institute study assumes that diversity jurisdiction has no proper place in Federal Courts and seeks to place the burden of persuasion on those who favor continuation of diversity rather than upon those who would abolish it.*

Thus, while the American Law Institute is indeed a prestigious body comprised of many individuals of eminent attainments, its apparent lack of objectivity in reference to diversity places upon Congress the full responsibility for consideration of whether to retain or abolish diversity. The statement that the issue is to retain or abolish diversity is made advisably for the American Law Institute Draft Proposals on diversity are remarkable in their approach.

The proposed statute on general diversity maintains with minor changes the existing provisions. However, the proposed section on exceptions then proceeds to eviscerate the heart out of general diversity, leaving only an empty shell. It should not be assumed, nor necessarily implied, that the American Law Institute is attempting to sell a bill of goods to the American public, i.e. to abolish diversity, but recognizes that it must obscure the labeling in order to make accomplishment of the feat more likely. If there are valid reasons for maintaining a small portion of diversity the same reason would apply to the retention of the major portion now sought to be excluded. Contra wise, if there are valid reasons for excising most of diversity jurisdiction, those reasons would also be applicable to the small portion that would remain. To say that we are maintaining diversity jurisdiction and then proceed to eliminate it for all substantial purposes masks the real issue: Should Congress choose to deny implementation of diversity jurisdiction as authorized under Article III of the Constitution.

Legislative consideration of the diversity issue in the context of the ALI study involves at least two concepts: The question of docket congestion and the question of federalism as evolved from our dual system of state and federal courts.

That docket congestion is a thing to be avoided is surely a common ground upon which all can agree. With deference to the ALI study, the existence of diversity jurisdiction is not the cause of docket congestion and the abolishment of diversity is not the cure for docket congestion. To be sure any grant of jurisdiction is a factor relating to case load, but it is a highly hypothetical exercise in statistical calculations to conclude that our current problems of congestion are diversity problems. Indeed it is submitted that the opposite is true; that federal court congestion is due to non-diversity cases. While the abolishment of diversity jurisdiction would alleviate, temporarily, the congestion in some districts, a fair projection of the federal case load would establish that the modest relief would be ephemeral.

The A.L.I. proposal would preclude a citizen of your state from suing in the federal court of his home state a citizen of another state. From a docket viewpoint, our national government with its vast resources should not accept as a fact that it is impossible to implement and provide a federal judicial system capable of handling of all cases of which Congress may wish to confer jurisdiction. Congress, of course, has the responsibility along with the executive and judicial branch to see that resources are made available to judicial branch to discharge the latter's responsibilities. It is submitted that the constitutional authority to provide for diversity jurisdiction cannot be abrogated merely because federal courts now have crowded dockets. No one would seriously contend that we solve federal court congestion by abolishing all jurisdiction of the federal district courts. On a more limited aspect, federal courts should not be placed on pedestals that they are too good and too busy, because of docket problems, to demean themselves with hearing, for example, a personal injury suit in which an ordinary citizen has chosen the federal forum.

That there are thousands of citizens that would be denied access to federal courts and perhaps more who are not choosing the federal court because of the imminent delay, is all the more reason why additional judges and improved judicial machinery should be implemented. Appointment problems aside, there is no shortage of able lawyers who would make competent federal judges. The question of whether the case load capabilities of the federal system should be expanded should depend primarily upon the concept of federalism.

*"It is eminently proper for each generation to reappraise its inherited institutions, but the present inquiry has a special urgency because of the continually expanding workload of the federal courts and the delay of justice resulting therefrom. It is unwise to paralyze the federal courts by maintaining conditions which will generate constant and unending pressure for the expansion of the federal judiciary. It is intolerable that these delays and these pressures be produced by cases that have no proper place in the federal courts." *Study of the Division of Jurisdiction Between State and Federal Courts, American Law Institute, Official Draft, Part 1, (September 25, 1965).*

With reference to federalism it is paradoxical that as the sovereign powers of the states have tended to decrease since 1789, that those who favor the increasing power of the Federal government would now choose to discard diversity. The increased power of the federal government should be argument in favor of greater federal-state concurrent jurisdiction. Causes of action seldom consist solely of state issues or solely of federal issues and certainly it is not generally practical to fragment a cause of action with some issues being resolved in the state system and other issues in the federal system. Moreover, considering that a dual system of courts is necessary, it is desirable that the interrelationship of the entities be enhanced by the exercise of concurrent jurisdiction. Extreme divergence of substantive and procedural law between various state judicial system and between the state systems and the federal system is not an end goal. The major procedural reform that was accomplished within the state judicial system by the impact of the federal rules of procedure would not have occurred without diversity jurisdiction. The jurisprudential value of the proposed federal rules of evidence will be thwarted without diversity. Competition between the federal system and the state system to provide the best system of justice for our citizens should be encouraged.

If anything, there is greater justification and need for diversity jurisdiction today than first existed because of the increased mobility and the interstate contacts that are an attribute of diversity cause of action. Citizens who wish to choose the federal forum should not be foreclosed by legislative fiat. Indeed a citizen who chooses the federal or state forum because he feels his chance for justice is better should not be faulted.

One of the other factors in favor of diversity jurisdiction is that federal judges because of the wide nature of their jurisdiction, even apart from diversity, are generalists and not specialists in a particular area of substantive law. Thus, it would not be logical to exclude diversity personal injury cases from the federal court docket (although this is inherently contemplated by the ALI study) as FELA, Jones Act, and Federal Tort Claims Acts cases will still require the federal court's attention. While perhaps unnecessary to state, a judge with a broad background of judicial experiences often possess a superior insight in contrast to a jurist with extremely limited subject matter exposure.

Reflecting upon federalism, the question of whether diversity jurisdiction should be substantially increased arises. The almost automatic rejection of this approach is predicated upon alleged horrors of docket congestion. This brings us full circle. If the case load capacity of the federal judicial system is expanded to meet the need and demand of its citizens, justice will be done. Justice will not be done by reducing citizens' access to the federal forum.

Mr. VANDERCREEK. Thank you.

One of the comments that I made had reference to the problem of docket congestion, and I feel this is a strong reason——

Senator BURDICK. We'll take a 5 minute recess.

(A brief recess was taken.)

Mr. VANDERCREEK. The ALI study undertakes a concern with congestion that exists on Federal courts docket and indeed I think that Federal courts themselves are extremely concerned as to congestion on their docket. As counsel in some cases, I have personal knowledge of the problems which exist in the Northern District of Texas, and they are in grave need of an additional judicial manpower that I understand is under consideration in the House Judiciary Committee.

I would respectfully urge that as tempting as it may be to help temporarily alleviate the Federal docket congestion which exists in some districts that we should not resort to the device of surgery on jurisdictional statutes, that Congress and the judicial branch should implement sufficient resources so that the Federal courts have an adequate caseload capacity.

The reason though about the congestion I feel is probably the most persuasive reason in favor of the curtailment of diversity of jurisdiction. In this regard, the ALI study seems to me to shift the burden

of proof, the emphasis seems to be on you must justify diversity jurisdiction or it should be abolished.

I should say that the burdening, if anything, should be on the other side. That they should be able to justify why we should do away with diversity.

But let me suggest as a rationale for diversity jurisdiction that we do have a dual system of courts. I think it is quite clear that a dual system of courts will be with us for a long, long time. It seems to me that it is axiomatic that if we had, then, litigation between citizens of different States that they should be given the choice of a Federal forum.

To my views, the fact that we do have States and recognize them as sovereign States for certain purposes under the Constitution is a reason in favor of the existence of diversity jurisdiction and not a reason for abolishing this, and I say this without any desire to represent an attitude of impinging or restricting the power of the States or the sovereignty of the States.

I believe in our system of State's rights and balances of the Federal Government and I am strongly in favor of a State judicial system and want the States to have the best judicial system that they can afford, but it seems to me that a citizen of your State, for example, should have the right to go into a Federal court in your State to sue a citizen of another State. Not only are they citizens of different States, but you have to recognize that the context and impacts of that judgment itself may have extra-State or extraterritorial effects.

For example, if you resort to a State court in your State and attain a judgment against a citizen of another State, then you have to take that judgment and sue on it in the other State. On the other hand, if you obtain a Federal judgment, you can simply register that in the Federal district court in the other State and proceed to collect an execution.

The existence of diversity jurisdiction is supported not only by the Constitution, but I think in practical reasons because we do recognize a system of State and Federal Governments. It seems to me natural that we should provide a judicial system that would recognize jurisdiction predicated upon diversity. Irrespective of whether the initial grounds that were considered were prejudice or not in the current system of our dual system of courts, the current existence of our State and our Federal Governments is justification for maintaining the existence of diversity jurisdiction.

Now I see nothing wrong with the shopping theory although the use of the shopping theory contains a connotation that something is bad about it. I see nothing wrong with giving litigants and lawyers a choice of forums, and I think concurrent jurisdiction is very healthy to our jurisprudential values. I think the important thing for Congress to do is to make the choice of the Federal system reflect the highest quality of justice which is available for the Federal Government to provide to its people.

I don't think the Federal Government should deny its citizens access to its courts. I think the Federal Government should make the doors of the Federal courthouse, if anything, wider, but, although I recognize a proposal of minimal diversity has little chance of being enacted and would receive a great deal of opposition, I would respectfully

urge this committee to consider the concept of minimal diversity which would greatly alleviate some of the problems of joinder and also solve some of the later problems that the committee—or the bill—has attempted to solve through its publishing of multiparties and so forth.

Also, in reference to jurisdictional matters, amount—my views are somewhat different than Professor Moore's. I see nothing wrong with maintaining the jurisdictional amount provision of \$10,000, but I would suggest consideration to two changes. One, I think because of construction, given the existing statute, that it be necessary by statutory revision to provide that jurisdictional amount in several claims will be done by aggregation so we don't have the troublesome burden of having to classify claims as several or joined.

Also, since the jurisdictional amount requirement is really a house-keeping device to keep out petty cases and should not be a trap for the litigant to find out 5 years later when he gets to the U.S. Supreme Court that no jurisdiction exists.

I would urge the committee to consider passage of a provision which in essence would provide that once the Federal district court determines the jurisdictional amount is prevalent that that ruling will be conclusive. I see nothing wrong about the Congress providing that a determination of existence of Federal jurisdiction as to jurisdictional amount by district court should be conclusive and I think it would solve a lot of technical problems which do arise on the appeal of jurisdictional amount cases.

That is basically my thoughts. I have expressed the others previously in my communication and the other gentlemen before me have delved in some specifics with reference to the statute. We did go into the statute. Obviously section 1301 is accessible, although I of course prefer the concept of minimal jurisdiction.

I would be strongly opposed to section 1302. My principal objection would be that I don't think a citizen or a dispute between citizens of different States should be precluded from exercising jurisdiction in the Federal forum.

Senator BURDICK. Thank you for your contribution today.

One thought came to my mind when you talked about the options open to the parties. That shopping necessarily shouldn't mean a bad thing, but that they should have a right to go into State or Federal jurisdiction. But isn't it a little bit one-sided? This option is generally open to the plaintiff, not the defendant.

Mr. VANDERCREEK. I certainly would be in favor of permitting the defendant to remove on the basis of diversity even though he is a resident of the State in which the action was pending, which is not precluded by 28 U.S.C. 1341 (b).

Senator BURDICK. That's just part of the answer. Suppose A from North Dakota and B from Minnesota had an accident in North Dakota. Now, A can bring it in the State court or he can bring it in the Federal court, but suppose B wants it in the State court. He is denied that privilege if A brings it in Federal court.

Mr. VANDERCREEK. If you want to have concurrent jurisdiction in a dual system of courts, I think it is obvious that the choice has to be paramount toward the one system or the other because of our obligations and the resources of the National Government and because it

represents the public interest of all the citizens and not merely citizens of the particular State. It seems to me that any controversy which involves citizens of different States, that the option should be to choose the Federal forum, and that either the plaintiff or the defendant should have that right.

Senator BURDICK. Once the plaintiff has made the election the defendant no longer has it.

Mr. VANDERCREEK. Once you choose the Federal court, that's true.

Senator BURDICK. So really it isn't a fair choice—a fair option to both parties, but just for the plaintiff.

Mr. VANDERCREEK. I would differ with that construction. I think that the choice is going to result in opportunity to select the Federal forum by either the plaintiff or the defendant.

Senator BURDICK. But your suggestion favors the choices of a Federal forum. A can bring the action in a North Dakota State court, but if A selects a Federal court there's no way that B can return the action to State court. A has that choice from the very beginning to bring it in the State court or the Federal court, but B doesn't have that option.

Mr. VANDERCREEK. Of course, B is the defendant and he is being sued, so he doesn't have—I think you have to put it in the context that the plaintiff should initially have the right to choose the forum. He's bringing the action. I think competition that may exist between State courts and Federal courts in this fashion is very healthy for a system of justice, and I think a plaintiff should have a right to initially choose a Federal court or a State court. I also feel that if he chooses the State court, that the defendant should then have the right to choose the Federal forum.

In other words, if we have a dispute between citizens of different States, I think the option should be guaranteed that either one of those litigants may have the right to have that matter heard and concluded in a Federal court.

Senator BURDICK. But they don't have the right to have it concluded in the State court.

Mr. VANDERCREEK. They can't have the right to hear it simultaneous in both courts.

Senator BURDICK. The only difference between the plaintiff and the defendant is that the plaintiff serves the papers first, but the defendant may have a good counterclaim. He may have the best case.

Mr. VANDERCREEK. Under our system of concurrent jurisdiction, if it's a transitory type of action, there is nothing to preclude the party from also bringing an action in the State court, and many times this is done, so it's not unusual to have an action filed in both Federal court and State court involving the same subject matter.

Senator BURDICK. That wouldn't last very long in State court, if there's one filed in the Federal court. I'll give them 15 seconds.

Mr. VANDERCREEK. I've had some judges that had some different thoughts.

Senator BURDICK. I'm just trying to make the point that the option you're talking about really inures to the plaintiff.

Mr. VANDERCREEK. I am viewing it rather as an advantage to the plaintiff. It would provide that both sides should have the option to choose the Federal forum, and then on balance because we do have diversity, that the right to choose the Federal forum should exist. I

don't think that parties should have the right to insist upon State forum and keep a party from going into Federal court where diversity exists.

Senator BURDICK. But you would admit that the plaintiff has better options than the defendant.

Mr. VANDERCREEK. Under the existing laws, there's no question. 1441(b) prohibits that removal, but as I say, I'm in favor of changing 1441(b), but I'm certainly violently—I shouldn't say violently—that has the wrong connotation today—strongly opposed to carving out of the general jurisdiction to meet the provisions that now exist in 1441(b). If we're going to do any changing, we ought to change 1441(b) and not change 1332.

Senator BURDICK. That doesn't answer the second part of my question that the defendant's options aren't as great as the plaintiff's, even if he changes.

Mr. VANDERCREEK. Of course, by the fact that he is the defendant, even though the other person may be sent to the courthouse. Something that we can't change without overhauling our entire procedure. I mean, the plaintiff is the one that institutes the suit and he gets certain rights.

He may pick a Federal court in California or he may pick a Federal court in Texas or he may pick the courthouse across the street.

Senator BURDICK. I have brought this out to show you that in the so-called Federal choice there is some limitations.

Mr. VANDERCREEK. Well, freedom of choice, of course, has created a lot of problems.

Senator BURDICK. I'm not talking about the other times. I'm talking about this one.

Mr. VANDERCREEK. I would point out this consideration. We've talked about forum shopping or whatnot. We still have that today between courts in different States, so—in which we cannot eliminate because of our dual system and because of recognizing State sovereignty and because so many more of our actions today have impact—impact and contact in more than one State. The option to select different State forums is far more apparent than was present 20 or 30 years ago.

I think the existence of diversity jurisdiction strengthens the general uniformity of the entire judicial structure of the State systems and the Federal systems.

To my way of thinking, the uniformity that can result is to the advantage of all of the people within this country. I think this is—has been promoted by diversity jurisdiction and examples are given as the proposed rules of evidence. I think also the overlapping of jurisdiction, the impact of *Erie v. Thompkins* has also helped create uniformity in substantive law.

So, for these reasons, I think we should expand diversity jurisdiction and certainly not cut it down in the fashion which we have under full consideration.

Mr. WESTPHAL. Mr. Chairman, just a few questions. If the existing diversity jurisdiction were changed so as to permit the in-State defendant to remove to Federal courts, then you would have a situation where both the in-State plaintiff and an in-State defendant would have the same choice of a forum under certain circumstances, so that

whenever either one of them is involved in litigation with a nonresident party, no matter where that case was commenced, even if it were commenced in State court, it seems clear that the case would probably wind up in the Federal court because if the plaintiff who had the option didn't select the Federal court in the first place, the defendant, thinking that the plaintiff had some dire trick up his sleeve in selecting the State forum, would probably remove to the Federal court. So, the net effect would be to increase greatly the number of cases that are brought in the Federal court under diversity jurisdiction. Isn't that true?

MR. VANDERCREEK. Well, I don't know if it really would result in increasing substantially Federal jurisdiction. Of course, your statement is true to some extent. If lawyer A takes one position, then opposing counsel figures he must want to take the opposite position without reasoning. I'm not sure that that would be a factor in removal jurisdiction. The defendant would be more tempted to remove to Federal court if there was a docket delay and congestion in Federal court.

MR. WESTPHAL. That's the second part of my inquiry here. If we have a dual system and presupposing that the State system is plagued by congestion and the federal system is relatively free of congestion as some of the Federal courts are now, then we're going to have a situation where everybody who has this option is going to choose the Federal forum merely in order to avoid the congestion and delay in the State courts.

MR. VANDERCREEK. Of course, I think that's wonderful. I think people have the right under our system of justice to prompt justice, and if we can provide more people with a good opportunity for faster disposition of their judicial proceedings, then more power to them.

MR. WESTPHAL. I would agree except that that solution then is available only to the party who happens to wind up in litigation with a nonresident defendant. It is available to the corporate party who has a principal place of business in some other State so that those types of litigants can then escape the bad State courts with a delay and escape into the current Federal forum and there never will be any incentive for that party or his attorney to try to do what he can in order to improve the State system. This is what concerns me.

MR. VANDERCREEK. Let me respond in this fashion to your statement. First of all, I think the fact that not all people are going to be citizens of different States is not a reason that we should abolish diversity jurisdiction. My thesis is that because we do have a dispute involving citizens of different States, it should be exercised.

As to the second aspect, the concept of increased diversity jurisdiction will have an adverse effect upon the quality of justice in State tribunals, is one which rationally I cannot accept. I think the more that we have lawyers engaged in practicing both the State courts and the Federal courts, the higher our overall quality of justice is going to be. I have a great deal of confidence in our State courts and in State judges. The resources, however, of States to provide for docket control and docket congestion certainly is not as great as the Federal court, and since the choice that I would favor is giving the plaintiff a right to choose a Federal forum and giving the defendant the right to a Federal forum, I think as an adjunct to that we must increase the caseload capacity of the Federal courts.

You mentioned some Federal courts don't have too much business. That may be true. My experience has almost been the other way, that the judges—Federal judges—have been working extremely hard, and yet they simply are not enough in manpower to meet these cases.

Now, if they were going to use the courthouse, and if they want to choose the Federal courthouse, I think Congress ought to assist the people in coming into that courthouse and make sure that it can facilitate the disposition of the litigation.

MR. WESTPHAL. But at some point there's got to be a limit on the extent to which the doors of the Federal courthouse are opened even wider, as you stated, because if you do not do that then the Federal courts will become themselves clogged with cases and have congestion, and they cannot be used as a forum to litigate cases in which there is a national interest to cause Congress to place some specific case within the jurisdiction of the Federal courts. This becomes a problem.

MR. VANDERCREEK. I differ from some of the prophets of doom within the Federal judiciary who feel that the obligation of the Federal caseload has reached an impossible task. I think this country has ample resources to greatly expand Federal jurisdiction and at the same time be able to handle and solve docket problems. Maybe we have to be more innovative in some of our judicial procedures, but as noted in my paper, I don't think we have any shortage of able lawyers. Sometimes the appointment problem becomes somewhat intriguing, but I think we have the manpower and the resources. Pandora's box to me, suggests that an increasing jurisdiction will cause the federal system to crumble.

Senator BURDICK. Thank you again.

MR. VANDERCREEK. Thank you very much, Mr. Chairman.

Senator BURDICK. The next witness is Professor Pelaez from Duquesne University.

STATEMENT OF PROF. ALFRED PELAEZ, SCHOOL OF LAW, DUQUESNE UNIVERSITY

MR. PELAEZ. Thank you, Mr. Chairman. When I asked Mr. Mullen the procedure, he said that generally we just introduce our written statement and then hit the high points. Well, I will follow that format. I introduce my statement into the record with the hope that I haven't already hit most of the high points with those few remarks.

Senator BURDICK. Your full statement will be part of record without objection.

(The document referred to follows:)

STATEMENT BY ALFRED S. PELAEZ, PROFESSOR OF LAW, DUQUESNE UNIVERSITY

THE SPOILS TO THE TRAVELER

The Bill we are to discuss today did not, like Topsy, just grow. It comes of nearly a decade of effort by many of the leading judges, lawyers and scholars of our time. As such, it is entitled to our most careful study and consideration. The changes to the federal diversity jurisdiction that the Bill would make, however, are so far-reaching and important that more than honesty of the drafters' efforts is required. It must be determined if the proposed revisions to the Judicial Code bring us closer than we now are to the unquestionably desirable goal of achieving "a proper jurisdictional balance between the federal and state court systems,

assigning to each system those cases most appropriate in the light of the basic principles of federalism."¹

Senate Bill 1876 does not completely abolish diversity of citizenship as a basis for achieving federal jurisdiction. Had it done so, the task of your Committee would be simpler—it would be necessary only to determine whether a need for diversity yet exists. Instead, the Bill's drafters recognize that there is a need for diversity jurisdiction and attempt only to establish more precisely the boundaries of that need. The Bill does not, however, create a workable and logical method of apportioning diversity cases between state and federal forums. It seems, instead, to do little more than reduce case-loads in the federal courts by raising the ante for admission. The proposed Bill does not, for instance, preclude a Pennsylvania citizen from bringing a tort action against a citizen of Connecticut in a federal court because this is a matter better handled by state courts. It requires only that, in order to gain admittance to a federal court, the Pennsylvania citizen commence his action in some state other than Pennsylvania. Thus, if the Pennsylvania plaintiff is willing, and can afford, to litigate in Connecticut, he can gain whatever advantage the federal system may offer. If he is unable, or unwilling, to make the expenditures necessary to litigate away from home, the federal forum will be unavailable. Unavailable not because the state courts are better equipped and designed to determine the particular cause; nor because trial of the cause in the federal forum would constitute an undesirable interference with state autonomy; nor because it would be preferable to see the use of the federal courts concentrated upon the adjudication of rights created by federal substantive law—unavailable *only* because of the Pennsylvania plaintiff's inability, or unwillingness, to travel to Connecticut to commence suit.

A system that conditions entry to a federal forum on the ability, or willingness, to incur added expense would be suspect even if choice of a state or federal forum made little difference in the outcome of a case. It borders on the unconscionable when this choice may critically affect the litigant's rights. *Erie v. Tompkins*² notwithstanding, the selection of a federal or state forum can, and does, have a significant effect upon the outcome of many cases. And, if the Proposed Federal Rules of Evidence are adopted—as I hope they will be—the difference in outcome depending upon choice of a state or federal forum will become even greater.

Allow me to illustrate by returning once more to the Pennsylvania plaintiff, whom I'll call Ben Penn, and the Connecticut defendant, henceforth scandalized as Tom Conn. Suppose that Ben and Tom were involved in a truck-car collision on the Pennsylvania Turnpike. At the time of collision Ben was alone in his truck and Tom was the driver of a vehicle in which Peter Honda, his wife's paramour, was the only passenger. Tom and Peter both died of injuries sustained in the collision, but shortly before his death, Peter told an attending physician that Tom had intentionally caused the accident in an attempt to kill him. There were no other witnesses to the collision. Ben—who miraculously escaped injury—spent \$10,100 to repair the damage to his truck.

If Ben is compelled to recover his loss in a Pennsylvania state court, he will be faced with at least two problems: (1) Pennsylvania's Dead Man's Act will prevent his testifying; and (2) Peter's dying declaration will be inadmissible—Pennsylvania only allows evidence of such statements in criminal cases. This means that, if Ben brings suit in a Pennsylvania state court, he may have a difficult time proving Tom's negligence. If Ben chooses a federal forum, however, one, or both, of the evidentiary problems may be removed. At least one federal court has already held that Federal Rule of Civil Procedure 43 permits a federal court to introduce evidence of a dying declaration in a civil cause even though in the state court admission of such statements is limited to criminal causes.³ And the proposed Federal Rules of Evidence—which may be applicable by the time Ben's case comes to trial—provide that state Dead Man's Acts are to have no effect in federal court proceedings.⁴ Clearly, as illustrated and in other ways, choice of a state or federal forum can affect the outcome of a case.

Today, Ben's lawyer would have little difficulty in deciding to bring suit in a Pennsylvania federal district court. If Senate Bill 1876 becomes law, however, the choice would not be quite so simple. Section 1302(a) of Senate Bill 1876

¹ The goal was set by Mr. Chief Justice Warren in an address to the American Law Institute in May, 1959.

² (1938) 304 US 64, 58 S Ct 817, 82 L ed 1188.

³ United Services Automobile Association v. Wharton (WD NC 1965) 237 F Supp 255.

⁴ See the Advisory Committee's Note to Rule 601, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates (March 1971).

would compel Ben to sue in a federal district court in Connecticut. The case could not be transferred to a federal forum in Pennsylvania even if all witnesses are residents of Pennsylvania. Indeed, there is a chance that federal jurisdiction would remain—but transfer to Pennsylvania still be prohibited—even if Tom's administrator is a citizen of Pennsylvania.⁵ Although commencing suit in a Connecticut federal court will solve many of Ben's evidentiary problems, it raises very real economic problems. Ben, of course, will have to travel to Connecticut and remain there during the pendency of his trial. To gain full benefit of the more liberal evidentiary rules in the federal court, Ben may also find it necessary, or at least wise, to induce the doctor to whom Peter made his dying declaration to come to Connecticut to testify; and, to prove damages, he may wish to have the repairman who fixed his truck testify. The expenses of transporting and housing these witnesses may cut so heavily into the damages Ben seeks that he could well decide to take the much more speculative chance of proceeding in the Pennsylvania state court. In short, Ben may be priced out of the federal courts. He may be economically coerced to litigate his *diversity case* in a state forum where chance of recovering compensatory damages is greatly lessened as a direct result of Senate Bill 1876's mandate that the only available federal forum be in Connecticut—even though that forum could, conceivably, be the most inconvenient forum for all witnesses and, perhaps, all parties! Thus, while availability of the Connecticut federal forum would present Ben with at least a feasible alternative had he been seriously injured, and thus have a "big case", it provides *no real alternative* in the hypothetical small case. And, this is so even though the drafters of Senate Bill 1876 concluded that Ben's case is that type of case that should properly remain within the diversity jurisdiction of the federal courts.⁶

The inadequacies of Section 1302(a) which would cause Ben such consternation are not the only flaws in Senate Bill 1876. The changes to diversity jurisdiction proposed in Sections 1302 (b) and (c) also deserve special comment. Section 1302(b) would limit the right of a non-resident corporation to sue in the federal courts of states where it maintains a local establishment. Section 1302(c) places off limits to an individual plaintiff the federal courts of the state in which he has his principal place of business or employment. The expensive, time-consuming and unproductive threshold litigation that these clauses will lead to can readily be imagined. Where, for instance, is the "principal place of business" of a traveling salesman employed by a New York corporation and who makes 60% of his sales in California and 40% in Oregon? And what more can be said about "local establishment", a term so imprecise that, the confusingly detailed definition in the Bill notwithstanding, it is sure to flood the courts with threshold litigation; or "action arising out of the activities of that establishment"? Professor Currie said it best when, after puzzling through each of these phrases, he declared: "[T]he American Law Institute, [the drafters of Senate Bill 1876] rather than proposing to simplify the jurisdictional determination, is intent upon complicating it."⁷

But complication is not the only problem caused by the proposals in Sections 1302 (b) and (c) of Senate Bill 1876. By barring a corporate plaintiff from the federal courts of a state in which it is neither incorporated nor has a principal place of business, but where it has a local establishment out of which the

⁵ This could come about since § 1301(b)(4) would make the administrator a citizen of Connecticut.

⁶ Cases like Ben's pose one other, and very real, problem. They often compel a local attorney to decide whether his client would be better off litigating locally in a state court, or great distances away in a procedurally neutral federal forum. The difficulty with this decision is that the lawyer who must make it will often have an economic interest in the matter. If, for instance, the local attorney decides to try the case in a state court he can do so with a minimum of inconvenience. If he decides that the client's cause will be better served in a federal forum, § 1302(a) will compel the lawyer to seek a foreign federal forum, which will necessitate the lawyer's traveling to and living in another state while the cause is being tried—and, thereby being unable to look after any other business; or compel him to forward the case to an out-of-State lawyer and share the fee. Either contingency makes the case less attractive financially.

In cases like Ben's—where the choice of forum can so drastically affect the result—it can hardly be doubted that the attorney would forward the cause to a foreign federal forum unless the client, after being fully advised, desired to assume the risk of a local trial to avoid his own inconvenience. In other cases, where the differences are more subtle or are in areas not readily foreseen, it is more likely that the litigant may end up in a state forum where he may nonetheless be prevented from presenting his best case. In every instance where a lawyer in good faith selects the local forum—only to find out, subsequently, that perhaps the cause would have gone better in a federal forum—the attorney may be faced with a malpractice suit alleging that he subverted the client's interest to his own. And, if he overcompensates by sending all close cases to be tried in a foreign federal forum, he will deprive the client of the wise counseling the latter sought.

⁷ D. Currie, *The Federal Courts and the American Law Institute* (1968) 36 U. Chi. L. Rev. 1, 49.

cause of action arose, Senate Bill 1876 may enable a broad based corporation to take advantage of its economic leverage. Suppose United States Steel—a Delaware Corporation with its principal place of business in Pennsylvania—has a dispute with a Wyoming merchant arising out of the quality of goods ordered by the home office of USS and shipped to a USS mine in Wyoming. Suppose further that this activity by the Wyoming merchant constitutes “doing business” in Pennsylvania and subjects him to service of process in Pennsylvania. USS could greatly inconvenience the Wyoming merchant by commencing suit in a Pennsylvania state court. While the Wyoming merchant could remove the cause to a federal court in Pennsylvania, Section 1305 of the Proposed Bill would prevent that court from transferring the cause to what is probably the most convenient forum—a federal district court in Wyoming. Section 1305(b) (1) does provide that if there is on convenient federal forum to which the Pennsylvania federal court could transfer the cause it can stay proceedings on such terms “as will assure the plaintiffs an opportunity to maintain suit upon the claim *in an appropriate State court.*” Whether the Pennsylvania state court is appropriate in this situation, even though grossly inconvenient to the small Wyoming merchant, is something to which I would hate to hazard a guess! By barring USS from proceeding as a plaintiff in a Wyoming federal court Senate Bill 1876 could force a small Wyoming merchant to travel three-quarters of the way across the continent to protect himself—a situation that, on the facts given, could most likely not occur today and one which I doubt the drafters of the Bill intended.⁸

One of the basic reasons for giving federal courts jurisdiction over causes between citizens of different states is to eliminate bias. But bias is a two-way street. It need not always favor the local party to the litigation—it can, as one of the preceding hypotheticals clearly points out, work to his detriment. The federal forums, to neutralize bias in diversity as well as in other causes within their jurisdiction, have not tried to “even things up” by favoring the foreign citizen in each cause. They have tried, instead, to eliminate bias by *equalizing opportunity*. The federal procedural rules; the proposed evidentiary rules; and the Judicial Code all strive to equalize opportunity by stripping away jurisdictional, procedural and evidentiary barriers to trial of the merits; barriers that have outlived their usefulness but which remain in effect in many of our state courts. Thus, each party to the litigation of a federal case has an equal opportunity to prepare and present his best case, and need not worry about being caught up in the “gamemanship” that too frequently dominates litigation of one’s rights. The Judicial Code, as it presently stands, comes near to achieving this goal of equalizing opportunity in actions involving citizens of different states. Most parties to such actions can effectively demand that they be allowed to proceed in a federal forum without the incurring of additional inconvenience or expense. And with just two amendments to the Judicial Code—elimination of the *Strawbridge*⁹ requirement of complete diversity and deletion of the final sentence of 28 USC 1441(b) prohibiting removal by in-state defendants—no party to such actions could be compelled to litigate in a state forum against his wishes. Senate Bill 1876 would destroy the equality of opportunity the present system so nearly creates and erect an economic and convenience barrier between the plaintiff and a federal forum. Its drafters justify this by rationalizing that a local plaintiff cannot complain if he is forced to try his case in a state forum since he, as a voter, can elect better judges and legislators. But this conclusion misses the issue entirely. The function of diversity jurisdiction should not be to

⁸ For the past 13 years the United States Supreme Court, by not speaking on the subject, has permitted state legislatures and courts to exercise the widest range of long-arm jurisdiction. Illustrative of this is *Seider v. Roth* (1966) 17 NY2d 111, 216 NE2d 312, and the long line of “Seider cases” that have followed in its wake; and *Bryant v. Finnish National Airline* (1965) 15 NY2d 426, 208 NE2d 439. Since the slightest of local contacts today seems sufficient to subject a foreign defendant to a state’s judicial process, minimum fairness requires that there be liberal transfer provisions. The ability of a foreign defendant to remove a case to a federal forum, and then transfer it to a more convenient federal forum, has solved many of these inequities in the past. See Judge Friendly’s statement in *Minichiello v. Rosenberg* (CA2d, 1969) 410 F2d 106, 118–119: “We note a further point which at least mitigates some of the many undesirable practical consequences of *Seider*. By their very definition actions of the *Seider* type will generally be removable to the federal courts, or indeed can be brought there. Once in federal court, they become subject to the salutary provision of 28 U.S.C. § 1404(a) . . .” If proposed Section 1302(b) is enacted, large numbers of cases will be removed from the federal system—where effective transfer provision exists—and results similar to those in the USS-Wyoming hypothetical are almost certain to increase.

See Also Twerski, *A Return to Jurisdictional Due Process—The case for the Vanishing Defendant* 8 Duquesne L. Rev. 220 (1970), reprinted in 38 Ins. Counsel J. 265 (1970).

⁹ *Strawbridge v. Curtiss* (1806) 7 US 267, 2L. ed. 435.

permit foreign defendants to choose a forum unavailable to local plaintiffs, any more than it should be to enable a foreign plaintiff to decide whether he should lock a local defendant into the latter's state court. If, in either instance, one party to the litigation will be compelled *against his will* to litigate in a forum that may, because of procedural or evidentiary inequities, compel him to fight an unequal battle, there is cause for concern. And, if the matter is one legitimately within the control of the federal courts because it involves citizens of different states, such action should not be condoned. If there is yet a need for diversity jurisdiction—and the drafters of Senate Bill 1876 clearly acknowledge that need—it must be applied even-handedly in a neutral and enlightened forum. It should not be simply a device for favoring that litigant who has traveled the greatest distance.

Mr. PILLAZ. I looked primarily, Mr. Chairman—I looked at these rules in light of Chief Justice Warren's statement that a proper jurisdictional balance between the Federal and State court systems is to be achieved—should be achieved. And I looked to section 1302 in particular, to see if, in fact, it would achieve proper jurisdictional balance, and I can't help but come to the conclusion that rather than reach an appropriate jurisdictional balance, all that section 1302 really does is relieve the Federal courts of caseloads by shifting cases to the State courts that perhaps shouldn't belong there.

For instance, take a case between a Connecticut motorist and a Pennsylvania motorist driving on the Pennsylvania Turnpike. A truck-car collision is the example I used. Now, section 1302 doesn't say that a collision of this type doesn't belong in a Federal court. It says only that if you bring it in a Federal court, if the plaintiff happens to be the Pennsylvanian, that if he wants to bring it in a Federal court he's got to travel to Connecticut. So, I'm not so sure that utilizing a device like this is so much achieving a proper jurisdictional balance as it is simply a device for reducing caseload by raising the ante to gain admission to Federal court.

Now, if the Pennsylvania plaintiff wants to litigate his case in a Federal forum he's going to have to travel to Connecticut and incur all the additional expense that that entails.

I'm suspect initially with any system that conditions entry into a Federal system upon your ability or willingness to incur additional costs. That makes me suspect of section 1302 to begin with; I think it becomes unconscionable when your choice of a forum can greatly affect the outcome of a case.

Now, *Erle v. Tompkins* notwithstanding, I think whether a plaintiff, whether a litigant, chooses a Federal or State court can greatly affect the outcome of his case. I'll again use the illustration in my prepared text—the automobile collision on the Pennsylvania Turnpike between the Connecticut defendant and the Pennsylvania plaintiff with the Connecticut defendant driving in his car with a guest passenger. Now, as a result of the collision, both the Connecticut driver and his guest were killed and the Pennsylvania driver didn't really suffer any serious injuries, but incurred \$10,100 damage to his truck. We also had a fact situation in there that shortly before the passenger died, he told the attendant physician that the Connecticut driver, the defendant, had intentionally caused the accident in an attempt to kill him.

Now, in a situation like this if the Pennsylvania plaintiff is forced to sue the Connecticut defendant or his administrator in the Pennsylvania State court he's going to have some serious problems. One, he can't get the dying declaration into evidence because Pennsylvania

only allows admission of such statements in criminal cases. They don't allow them in civil cases. Second, he's not going to be able to testify as to the deceased driver's negligence because of Pennsylvania's Dead Man's Act. If we assume, as is the case in many of these accidents, that there aren't any other witnesses to the collision, it's going to be virtually impossible for him to succeed in a Pennsylvania State court. He will probably lose.

If, on the other hand, he travels to Connecticut, he could probably get most, if not all, of his evidence into the Connecticut State court. There is some authority that Federal rule of civil procedure 43 is broad enough to enable him to get the dying declaration into evidence in the Federal court in Connecticut; and if the proposed Federal rules of evidence are passed, as I hope they will be, he'll be able to testify as to the deceased defendant's negligence, because the Dead Man's Act will not apply in Federal proceedings.

Now, if you force this man to try his case in Pennsylvania, he has a very difficult uphill battle. If you allow the man to travel to Connecticut, commence his suit in the Federal district court there, it's all downhill in proving liability, but he's got some practical problems. He's only got a \$10,100 case. It's a fairly small case for damage to his truck. He's going to have to get his witnesses. There's the doctor who heard the dying declaration. He might want to, in order to present his best case, take these witnesses from Pennsylvania to Connecticut to try the case there. Now, in a small case, this becomes—this offers him no real resolution to his problem. Either he's got to take the very speculative risk of trying his case in a Pennsylvania State court where he may well lose, but where it would be cheaper to try his case, or he and his witnesses will have to travel up to Connecticut and stay there during the pendency of the trial so he can proceed in the Federal district court in Connecticut where liabilitywise, he'll be on much sounder ground, but where the cost of trying the case will eat so greatly into the recovery he's seeking, that it probably won't be worth his while to do so.

I come to the conclusion that he really doesn't have any alternative in a situation like that. He doesn't have any real alternative through no fault of his own.

Senator BURDICK. We're taking a brief recess.

(Whereupon, a brief recess was taken.)

Senator BURDICK. Proceed.

Mr. PELAEZ. Thank you, Mr. Chairman.

In the hypothetical I gave you, it seems to me that you've got a situation where the proposed rules say that this is a case properly within the diversity jurisdiction of the Federal courts, but you force small claimants like the Pennsylvania defendant with a claim just barely in excess of \$10,000 to incur such expenses to obtain those rights, the right to a Federal trial, that to all intents and purposes, you have priced him out of the Federal courts. You haven't deprived him from litigating in the Federal court because his cause of action is not one properly in the Federal jurisdiction; you have deprived him of litigating in that court purely and simply because he can't stand the cost of admission.

And I think that that's something we should be concerned with. I tend to agree with Professor Moore when he would eliminate entirely the monetary requirements for bringing a case in the Federal court,

and I find it absolutely unconscionable that you would place these additional economic barriers in the road of a plaintiff who has what the drafters of S. 1876 would concede is a Federal case.

I think in large measure section 1302(a) is not concerned with reaching a proper balance between State jurisdiction and Federal jurisdiction. I think instead, it raises the ante sufficiently so that only large cases can be brought in Federal district court. Only large accident cases where you're shooting for considerably more than \$10,000.

This brings up another point that I think we ought to be concerned with. Suppose the Pennsylvania plaintiff in this case had gone to a Pennsylvania lawyer and asked him, "How should I proceed?" Now, in a case like this, there wouldn't be much doubt, where it would be so difficult to prove liability in the Pennsylvania court, I have very little doubt that most members if not all members of the bar would refer him to a Connecticut lawyer or tell him to find counsel in Connecticut to try his case.

But what about situations where there the difference might be important ultimately, but they are not quite so blatant, or where they are not quite so obvious at the outset. We will get situations where a Pennsylvania counsel will have the choice of trying the case locally in the Pennsylvania State court or forwarding it up to Connecticut to be tried in the Federal district court. If the guess is wrong, if he says, "Gee, I can win this thing in the State court," and then because of the limited rules of discovery or more restrictive rules of evidence, he loses the case, I wonder if he won't subject himself to malpractice suits because he has ostensibly subverted the client's interest to his own.

Now, I don't know if that's farfetched or not, but I think it's a consideration that most lawyers, in trying to make a determination as to whether to forward the case to another counsel, thereby splitting the fee, or trying it locally, are going to have to consider. I'm sure the easy way out is to forward all close cases up to Connecticut, up to the Federal court for trial by another counsel, or to try it yourself away from home, which is much less financially attractive. But if you just automatically forward all the close cases, you deprive the client of the sage counsel he seeks.

Senator BURDICK. I have two questions. First, if on this turnpike you have the same fact situation with the exception that the driver and the passenger, if there are three parties, were residents of Pennsylvania. There's no cause of action—it would be difficult for the plaintiff to prevail.

Mr. PELAEZ. It would be extraordinarily difficult; you're absolutely right. I think the only difference really is that in the one situation you do have citizens of different States; you have a situation that—

Senator BURDICK. But, if they are local residents, the plaintiffs are out of luck.

Mr. PELAEZ. Yes; they probably would be.

Senator BURDICK. Isn't the answer that we have uniform procedural statutes throughout the country, uniform rules of evidence? Isn't that the answer?

Mr. PELAEZ. I think that would go a long way toward curing most of the present evils, but the fact is, we've got 50 States in which we would have to put these rules through, and I think that is something that may come about eventually, but I don't suppose we can do it in the foreseeable future.

Senator BURDICK. It seems to me what you've presented here is an evidence question and not a jurisdictional question.

Mr. PELAEZ. In large measure, except the Federal courts, I think, have cleaned up the rules of procedure and are in the process of cleaning up the rules of evidence so that you can get a trial on the merits, or you are more likely to, than in the State courts today.

The second thing that bothered me as I read through these rules—and I think this fits the other illustration rather well—sections 1302 (b) and (c) would bar a corporate plaintiff from bringing a cause of action in the State in which he is neither incorporated nor has his principal place of business, but where he has a local establishment, if the cause of action arises out of that local establishment. And I got to thinking about that, and I thought that rather than causing foreign corporations to have to litigate locally, that could have just the reverse effect.

I think that in that clause there is great potential for a broad-based corporation, a corporation with, say, some business in almost all States, to utilize its economic leverage to the disadvantage of localized parties. The illustration I used was United States Steel and a local Wyoming merchant, but you can utilize practically any combination of parties you want.

Suppose that United States Steel, which I think is incorporated in Delaware and probably has its principal place of business in Pennsylvania, suppose it has a mine in Wyoming, and in the operation of that mine decides it's necessary to order some goods from a local Wyoming merchant. If the proposed changes to diversity jurisdiction go through, and if it has the foresight to order those goods through its Pittsburgh principal place of business, have all the paperwork go through Pittsburgh, I suspect that the Wyoming merchant would find that he is subject to a Pennsylvania long-arm statute—that he is doing business in Pennsylvania—and if there is a defect in the goods United States Steel could probably get jurisdiction over the Wyoming defendants, a local Wyoming defendant, in a common pleas court in Pennsylvania under Pennsylvania's long-arm statute.

The Wyoming merchant, if this bill goes through, could remove the case to the Federal district court in Pennsylvania, but he could not transfer it back. He would be precluded from transferring it back, I think, under the proposed rules.

Now, the rules say that if there is no convenient Federal forum to which the Pennsylvania Federal court can transfer the cause, it can stay proceedings on such terms "as will assure the plaintiffs an opportunity to maintain suit upon the claim in an appropriate State court."

I don't know what "an appropriate State court" means, but I rather suspect that possibly Pennsylvania might be an appropriate State court in the situation since you could get jurisdiction of both the plaintiff and the defendant pursuant to the Pennsylvania long-arm statute. And, if that is so, as a result of section 1302(b), the local Wyoming merchant might find himself having to fly three-quarters of the way across the continent to defend himself in a purely local transaction.

Senator BURDICK. Wouldn't that situation exist regardless of whether it is a local establishment in Wyoming or not?

Mr. PELAEZ. Could it occur, sir? Is that what you mean?

No, I don't think so. I think today the Wyoming merchant could remove it to the Federal court, and I think the Federal court would be free to transfer it to the most convenient forum, and Wyoming would be a forum where it could have been brought originally by United States Steel, so it would be transferred back there. But you eliminate a lot of the advantages of Federal transfer by stripping away diversity jurisdiction as S. 1876 would do. And I think this is a particularly inappropriate time to be stripping away the transfer rights because long-arm statutes have just really exploded during the last 13 years. It's been about 13 years since the Supreme Court of the United States has spoken on long-arm statutes, and in that period of time the States have passed long-arm statutes that bring practically everybody within their jurisdiction.

I think the *Seider* cases in New York are perfect examples of that. In quasi-defending the abominable results of the *Seider* cases Judge Friendly, in *Minichiello v. Rosenberg*, the second circuit case, said: "We note a further point which at least mitigates some of the many undesirable practical consequences of *Seider*" (which is a case where the New York courts had jurisdiction over a defendant who had only the most minimal of contact with that State.) He said, "By their very definition, actions of the *Seider* type will generally be removable to the Federal courts, or indeed can be brought there. Once in Federal court, they become subject to the salutary provision of 28 U.S.C. 1404(a)."

I think that as Senate bill 1876 is drafted it would remove almost all the salutary effects of transfer and it would enable broad-based corporations, corporations like United States Steel who do business in virtually all the States, to utilize economic leverage over purely localized defendants by simply requiring that all paper has to come through the Pittsburgh office of United States Steel.

And as we've seen before, some of the comments that were made earlier today, I have very little doubt that corporate counsel will soon become aware this is an available device and begin utilizing it.

In concluding, I'd like to point out that one of the basic reasons for giving Federal courts jurisdiction over causes between citizens of different States, is to eliminate bias. But I'd like to point out that bias is a two-way street. Bias doesn't always work in favor of the local party to the litigation. As the illustrations point out, at least one of the illustrations point out, the Pennsylvania Turnpike illustration, bias can work to the detriment of the local party, and I think the important thing and something that we're missing is that the Federal forums, in order to neutralize bias in diversity cases, haven't tried to even things up by favoring the foreign citizen in each case.

They've eliminated bias, or tried to, by equalizing opportunity. They've eliminated bias by procedural reform, by evidentiary reform, that has stripped away most of the barriers to getting a fair trial on the merits.

That's how they've eliminated bias. Not by stacking the odds in favor of the foreign defendant.

I think this is an important point, because the drafters of the ALI proposal, which is Senate Bill 1876, are destroying the equality of opportunity that we have almost reached by too narrowly construing what is meant by bias.

Bias occurs, I think, when any party has to litigate against his will in a forum where he can't put in his best case or where, because of outdated procedural or evidentiary rules, he goes into litigation with one hand tied behind his back.

This is the benefit of the Federal forum. They aren't any more enlightened than State courts. In some instances they are not as enlightened, but they have consistently tried to eliminate those evidentiary rules and procedural rules, which are barriers to a fair trial on the merits, which no longer have any real purpose.

Senator BURDICK. If the rules of evidence and the rules of procedure are uniform in the Federal system and in the 50 States, that seems to answer most of your arguments today.

Mr. PELAEZ. Yes, sir. I think it would go a long way toward answering them, and I think then, in the State courts, as presently in the Federal courts, both parties could go about the business of having the merits of their cases decided.

Senator BURDICK. But this isn't the question of jurisdiction so much as it is of evidence or procedural rules.

Mr. PELAEZ. Yes; except that they are intertwined, sir. I don't think you can separate one out from the other, because if you don't allow me jurisdiction to get into the Federal courts, you force me into a forum that is not so procedurally or evidentially enlightened. You could cause me considerable harm.

Senator BURDICK. Counsel has some questions.

Mr. MULLEN. Could I go over the example of the Wyoming merchant's suit by United States Steel? I believe that you have stated that if the Wyoming merchant made a request, the court would have to look for some appropriate State court to try this case in. Why wouldn't Wyoming be an appropriate State court to try this case in?

Mr. PELAEZ. I don't see how they could force suit in Wyoming when suit had already been removed from the Pennsylvania State court which was also an appropriate place. What is the authority for *B* saying Pennsylvania isn't an appropriate forum?

Mr. MULLEN. There aren't enough details given, I think, to tell, but if it arises out of some arrangement for sale that took place in Wyoming, and witnesses and the goods and so on were located there, then Wyoming might be quite appropriate.

Mr. PELAEZ. It certainly would, but it would then compel, without benefit of any statute of which I'm aware, the Federal district court to send the case to a Wyoming State court in preference to a Pennsylvania State court, which also has jurisdiction over both parties.

Mr. MULLEN. But that seems to me exactly what's intended by section 1305(b)(1).

Mr. PELAEZ. I'm not so sure it would work that way.

Mr. MULLEN. Why not?

Mr. PELAEZ. I don't see what their authority would be for concluding that the Wyoming State court is a more appropriate State court than the Pennsylvania State court.

Mr. MULLEN. Assuming the facts that the witnesses, the goods, the facts in issue were located in Wyoming, and that therefore that would be a more appropriate court for trial.

Mr. PELAEZ. But Pennsylvania, because the contract was consummated there, its long-arm statute would apply, and that would be appropriate, too.

Mr. MULLEN. There is jurisdiction there, but that does not resolve the question of whether or not it is the most appropriate forum in which to hear the case. Obviously, that is the policy under 1404 now.

Mr. PELAEZ. What this boils down to is more threshold litigation, litigation to try to determine precisely where they can bring the case, when we're trying to get to the merits.

Mr. MULLEN. But you have the same kind of a question now. An argument could arise on precisely the same situation, whether or not the case would be heard in the western district of Pennsylvania or whether it would be transferred to the district court in Wyoming, and you have the kind of factual search that would have to be made by the court to see, in light of all the facts, where the most appropriate forum existed. The only difference would be whether or not it would go to a different Federal forum or to be returned to a State court.

Mr. PELAEZ. I think that you've got a problem of perhaps constitutional dimensions when a Federal forum sets itself up as the arbiters to which State court it should go.

Mr. MULLEN. Do you know whether or not the State of Pennsylvania has a rule of forum non conveniens?

Mr. PELAEZ. Enabling them to transfer them to another State?

Mr. MULLEN. No; they would just defer jurisdiction. They would not exercise jurisdiction.

Mr. PELAEZ. To my knowledge, I don't think they can do that.

Mr. MULLEN. If I could just pursue this hypothetical a little further. I'm not sure whether this case arose out of local activities of United States Steel in Wyoming, but if we assume that it didn't, then could the Wyoming defendant request a transfer to the U.S. district court in Wyoming?

Mr. PELAEZ. No, not if it didn't arise—no, I don't think so.

Mr. MULLEN. I'm talking about under the proposals in S. 1876.

Mr. PELAEZ. I think then it would be improper, wouldn't it? That's his home State, so he couldn't transfer there. It just seems to me that there are too many ways by which this bill can possibly end up doing that which its proponents would not want it to do.

I think if the matter is legitimately a matter within the control of the Federal courts because it involves citizens of different States, such action can't be condoned. The committee that drafted the bill has said that there is need for diversity jurisdiction. They've incorporated that need in Senate bill 1876, and I think that if there is a need for diversity jurisdiction, it must be applied evenhandedly and in a neutral and enlightened forum where both sides would get the merits of the case heard. It should not be a device for serving that litigant who has traveled the greatest distance.

Senator BURDICK. One further question. You seem to feel that one of the purposes of diversity jurisdiction is to provide the widest possible opportunity to utilize the superior procedure of the Federal courts. Is that your position?

Mr. PELAEZ. The purpose of diversity is to allow parties to litigation between citizens of different States, both to end up in a forum where

they can most likely get their case heard on the merits, and not get into procedural and evidentiary tangles.

Senator BURDICK. Your testimony indicates that you think the Federal courts have a superior procedure as opposed to the State courts?

Mr. PELAEZ. I think by and large that's an accurate statement, sir.

Senator BURDICK. Then the opportunity for better procedure does exist in the Federal courts, in your opinion?

Mr. PELAEZ. More uniformly; yes.

Senator BURDICK. Thank you.

Prof. John E. Kennedy?

STATEMENT OF PROF. JOHN E. KENNEDY, UNIVERSITY OF KENTUCKY LAW SCHOOL, AND VISITING PROFESSOR, SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW

Mr. KENNEDY. I will proceed on the basis that my written statement has been read into the record. I will also try to be brief by substantially agreeing with the testimony of the previous witnesses. I will therefore try to limit myself to raising a very few brief points that I do not think have been discussed previously in the testimony and the discussion.

Senator BURDICK. Your suggestion is appreciated, and your entire statement will be part of the record.

(The document referred to follows:)

STATEMENT OF JOHN E. KENNEDY¹

1. This statement will be limited to comments upon proposed Chapter 84, "District Courts; General Diversity of Citizenship Jurisdiction." To summarize my view, I disagree with the stated objective of restricting diversity jurisdiction, as contained in all of proposed § 1302, and its related sections.

2. The reasons for my disagreement have already been well stated by Judge Wright, by Professors Moore and Weckstein, and by Mr. Frank.² The Commentary of the American Law Institute attempts to rebut these views but in the end simply treats them as irrelevant to the rationale the ALI has preconceived.³ I will confine myself to points I do not think were expressly raised in the exchange of viewpoints contained in the articles cited in the footnote and the Commentary.

3. In reviewing the rationale to which the ALI has committed itself, it is important to note at the outset that any position the ALI takes is entitled to no greater weight simply because the people dominant in the ALI have a certain point of view. Their scholarship, objectivity and craftsmanship are entitled to great respect, but not their ideological position. As an example of this point, I think it is conceded today that the American Law Institute's First Restatement of the Conflict of Laws, while a very scholarly and elaborate system, rests upon an ideology which, by recognizing only one value, states too narrow a rationale upon which to build a modern system that should recognize multiple interests and values.⁴

4. It is submitted that the rationale of the ALI proposals makes the same error in too narrowly stating the minimal functions of diversity jurisdiction, and in excluding the possibility of other, maximum functions that arise from making

¹ Professor of Law, University of Kentucky; Visiting Professor of Law, Southern Methodist University School of Law, Dallas, Texas; Author, *Federal Rule 17(a): Will the Real Party In Interest Please Stand?* 51 Minn. L. Rev. 675 (1967); *Federal Rule 17 (b) and (c): Qualifying to Litigate in Federal Court*, 43 Notre Dame Law. 273 (1968); *Let's All Join In: Intervention Under Rule 24*, 57 Ky. L. J. 329 (1969); Co-reviser, *Moore's Federal Practice*, ch. 17, 24.

² J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317 (1967); Moore and Weckstein, *Diversity Jurisdiction, Past, Present and Future*, 43 Tex. L. Rev. 1 (1964); Frank, *For Maintaining Diversity Jurisdiction*, 73 Yale L. J. 7 (1963).

³ Commentary at 458, 464.

⁴ See David F. Cavers, *The Choice of Law Process*, 19-32 (1965).

the federal court system freely available to all interstate disputes.⁵ The ALI rationale is further accompanied by other premises which reflect unduly narrow attitudes toward the dispensation of justice.⁶

5. The ALI proposals are based upon theoretical viewpoints about what the federal system ought to be. There has been no attempt to find out what the people of the United States feel about this subject. That is not to say that we can decide this issue by a public opinion poll. However, there were certainly available and known to the Institute fact research methods⁷ which, in the ten year study period, could have been utilized, at least to the extent of describing factually how lawyers view the appropriate function of diversity jurisdiction.

6. In particular, one premise of the ALI seems to be that lawyers want concurrent diversity jurisdiction in order to have more options to manipulate victory and are not concerned about appropriate divisions of judicial power in a federal system. As Professor Wright states:

"It would be pleasant to think that this enthusiasm for federal jurisdiction is a tribute to the high quality of federal courts. If that were so, it would be time to institute a crash program for improvement of the state judicial systems. The proposition would have been tested if the Institute had proposed extending jurisdiction as far as the Constitution permits, but making that jurisdiction exclusive so that the option of a State forum would no longer have been available. My guess is that the critics I have just described would have been even more outraged by such a proposal, for I believe the basis for their position is not that they love the state courts less but that they love a choice of forum more."⁸

If these guesses and beliefs are at the heart of the ALI's rationale, they should be tested factually. When put to the choice between no concurrent diversity jurisdiction or exclusive federal diversity jurisdiction, perhaps lawyers might in fact choose the latter.

7. Even if the rationale of the ALI is accepted and section 1302(a) is adopted, I would urge that subsection (b) and (c) not be adopted because these subsections will plague the administration of diversity jurisdiction with an extensive collateral question of fact and law, going to the subject matter jurisdiction of the

⁵ Some functions of justice either not mentioned in the literature, or not given enough emphasis are: (a) the quality of the federal judges under life time tenure and compensation of \$40,000 per year in comparison with state court politically elected judges with less compensation, see Jacob, *Justice In America* (1965); (b) the availability of interstate venue transfer under 28 U.S.C. § 1404 in contrast to the doctrine of *forum non-convens*; (c) the future improvement in administration of justice through the Federal Judicial Center and related activities in contrast to the absence of effective tools of judicial administration in many states; (d) the quality of federal juries as provided in "The Jury Selection and Service Act of 1968" 28 U.S.C. §§ 1861 *et seq.* in contrast to many state practices which may be constitutionally suspect; (e) the Federal Rules of Civil Procedure, including discovery and class action rules, and their system for constant review and revision; (f) the power of the federal judge versus the power of the state judge over control of trials, see Lukowsky, *The Constitutional Right of Litigants to Have the State Trial Judge Comment Upon the Evidence*, 55 Ky. L.J. 121 (1966); (g) the intangible qualities of justice in the federal court versus the state court as exemplified by one lawyer's comment, "I would almost rather lose in federal court than win in state court."

⁶ Borrowing from the definition of "puritan" as the uneasy feeling that somewhere, someone else is having fun, one might describe the ALI as uneasy with the feeling that federal litigants may be obtaining more justice than they would obtain in the state court. Thus it is wrong to assume, as the ALI Commentary assumes throughout, that litigants must somehow "deserve" diversity jurisdiction. They should be entitled to it as a matter of federal constitution right upon becoming engaged in a controversy with a citizen another state. It is wrong to assume, as the Commentary tends to assume, that because federal court justice may be available to some cases based on state law and not to others, that this result "discriminates" against those who must accept state court justice. It is wrong to assume that the way to improve deficient state systems is to take litigants who have present access to a good system and subject them to a deficient system. It is wrong to assume that creating options of concurrent court jurisdiction automatically plays to evil motivation in lawyers. It is just as possible to assume that, where the chances for victory are the same the lawyers' choices may, over the long run, collectively seek the better system of justice. For example, the use of fictions to expand the jurisdiction of the writ of ejectment as the method of trying title to land can be traced in part to the fact that "more advanced methods of trial [were] available in ejectment. . . ." Paul Carrington, *Civil Procedure*, 23 (1969).

⁷ E.g., W. A. Glaser (ed) *Pretrial Discovery and the Adversary System* (Russell Sage Foundation 1968); Kalven & Zeisel, *The American Jury* (1966); Rosenberg, *The Pretrial Conference and Effective Justice* (1964).

⁸ Charles A. Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 Wash. & L. L. Rev. 185, 206-207 (1969).

court, and hence will make it more costly and difficult for the federal court to produce final decisions on the merits.⁹

8. Similarly, I see no need to enact section 1307(b) as a supplement to present 28 U.S.C. § 1359 in light of the Supreme Court decision in *Kramer v. Caribbean Mills*, 394 U.S. 89 (1969) and the trend of Circuit Court decisions exemplified by *McSparren v. Weist*, 402 F. 2d 867 (3d. Cir. 1968). The breadth of the language in § 1307(b), specifically, "Whenever an object of a . . . transfer," may burden diversity claims with elaborate collateral issues.¹⁰

9. The proposed limitations on venue transfer, sections 1305(b) and 1305 (a) and (b), are subject to the same criticisms. In addition, these sections show that, in order to carry out the ALI rationale, some actions either may be tried in the most inconvenient forum when they would otherwise be transferable, or else will be subjected to stay-abstention orders that are productive of delay, confusion, and protracted litigation.

MR. KENNEDY. Thank you.

I will start by commenting, at page 2 of my written statement, in the paragraph labeled No. 5: The American Law Institute proposals are based upon theoretical viewpoints about what the Federal system ought to be. There has been no attempt by the ALI to find out what the people of the United States feel about this subject. That is not to say that we can decide this issue by a public opinion poll. However, there were certainly available and known to the ALI fact research methods which, in the 10-year study period, could have been utilized, at least to the extent of describing factually how lawyers view the appropriate functions of diversity jurisdiction.

In making this point I would like to refer the subcommittee to the examples cited in footnote 7. The first example is the study of discovery in the Federal courts. The study is reported by A. W. Glaser, as editor, and it was undertaken by the Russel Sage Foundation. The study involved a comprehensive investigation with sociological survey teams and statisticians, in order to examine through extensive interviews with lawyers engaged in the discovery in Federal courts, as to how the rules are working, what their cost efficiency effect was, and then on the basis of that study, formulating changes in the rules of discovery.

The whole approach there was not to approach the discovery rules from preconceived viewpoints as to whether they were good or bad, but rather to go out in the field and document in fact, how they were operating first, before making changes.

As a second example, the citation in footnote 7 to Kalven and Zeisel, the "American Jury," describes the 10-year project at the University of Chicago. There they attempted to document what, in fact, goes on in the jury's mind and in the jury decisionmaking process as the basis for promoting changes concerning the jury, as opposed to operating from preconceived notions.

As a third example, the citation in footnote 7 to Rosenberg, the "Pre-trial Conference and Effective Justice," refers to Professor Rosenberg at Columbia and his well-known devotion to factual research on procedural matters. In this study of pretrial conferences in the Federal courts, he again seeks out the facts concerning the actual operation of the pretrial conference rule.

⁹ Although Professor Wright is on record as favoring § 1302(a), he apparently opposes (b) and (c), Wright, note 8, *supra* at p. 204.

¹⁰ See Kennedy, *Will The Real Party In Interest Please Stand?* 51 Minn. L. Rev. 675, 720-722 (1967); cf. dissent by Judge Biggs in *Esposito v. Emery*, 402 F. 2d 878 (3d Cir. 1968).

The next point is somewhat related to my first point. That is, as I say in paragraph 6 on page 2: "In particular, one premise of the American Law Institute seems to be that lawyers want concurrent diversity jurisdiction in order to have more options to manipulate victory and are not concerned about appropriate divisions of judicial power in the Federal system."

I then quote from Prof. Charles A. Wright an example of this and pose the question again that if such beliefs and viewpoints are at the heart of the ALI's rationale, they should be tested factually, and not be used as a basis for proceeding from a preconceived notion.

The final point that I would make, in paragraph 7, is that even if the rationale of the American Law Institute is accepted and Congress proceeds on to section 1302(a) (which eliminates the right of the in-State plaintiff to come into the Federal court), I would strongly urge that subsection (b) and (c) not be adopted. The reason is that even if you adopted subsection (a), these subsections will plague the administration of diversity jurisdiction with an extensive collateral question of fact and law, going to the subject matter jurisdiction of the court, and hence will make it more costly and difficult for the Federal court to produce final decisions on the merits.

On that point I want to refer the subcommittee to footnotes 8 and 9, citing to Prof. Charles A. Wright in his article in the *Washington & Lee Law Review*. I think Charles Wright takes the same position, that is that while he is in favor of 1302(a) (which I am not), he is against subsections (b) and (c) (the establishment clause and the com-munter clause), basically for the reason that, while he agrees with the theory, they are such unworkable propositions that in the balance of his judgment, he would choose workability over the theory.

I think most all of my other comments have been covered in previous testimony.

Senator BURDICK. Are you a co-author of Professor Moore's Federal practice study?

Mr. KENNEDY. I don't know if that is a correct term. I'm a co-reviser of certain chapters.

Senator BURDICK. I noticed you have a law review article in the *University of Minnesota Law Review*.

Mr. KENNEDY. Yes, sir; that's my home State.

Senator BURDICK. Did you go to the university?

Mr. KENNEDY. No; I went to Notre Dame and Yale.

Senator BURDICK. We'll forgive you for that. I went to the University of Minnesota.

Well, I want to thank you and your fellow professors for your contribution this afternoon. We've got a controversial question on our hands, and we're going to try to resolve it as best we can, with all the evidence we can get from all sides. And there will be more hearings on this subject.

Thank you for your time.

(Whereupon, at 3:15 p.m., the subcommittee hearing was concluded.)

THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS

WEDNESDAY, OCTOBER 6, 1971

U.S. SENATE, SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY OF THE COMMITTEE ON THE JUDICIARY, *Washington, D.C.*

The subcommittee met, pursuant to recess, at 10 a.m., in room 3110, New Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senators Burdick and Gurney.

Also present: William P. Westphal, chief counsel; Michael J. Mullen, assistant counsel; Kathryn M. Coulter, chief clerk.

Senator BURDICK. Our first witness this morning will be John P. Frank, attorney at law, Phoenix, Ariz. Good to see you, again, Mr. Frank.

Mr. FRANK. Senator, you are going to figure that I am a professional witness and it really is not true. I am a professional lawyer, and the fact that I have appeared before you twice in 1 year I promise is coincidence and I just will not come back.

Senator BURDICK. On the contrary, we want the benefit of your expertise.

Mr. FRANK. You just happen to have come to two subjects this year in which I have a very great interest, and it is nice to be back; I thank you.

STATEMENT OF JOHN P. FRANK, ATTORNEY AT LAW, PHOENIX, ARIZ., APPEARING IN BEHALF OF THE COMMITTEE FOR DIVER- SITY JURISDICTION, AND THE STATE BARS OF ARIZONA, OREGON, UTAH, WASHINGTON, AND HAWAII

Mr. FRANK. Senator, I have filed a statement with you, and I have had to add a supplement. Let me note that I am appearing for the Committee for Diversity Jurisdiction, and I will identify that more fully in just a few minutes. I am also appearing officially on the request of the leadership in each case for the State bars of Arizona, Utah, Oregon, Washington, and Hawaii. I will be presenting to you a number of letters from various chief justices. In that respect, I am simply serving as a transmittal agent, putting them into this record but not as an official representative.

Senator, I think probably it would be a waste of your time to give you much personal background; it is all written into the statement, anyway, as it needs to be.

I will note, therefore, simply only that I have been a practitioner in Arizona for the last 17 years. Prior to that I was a professor in the field of the law of jurisdiction and procedures, among others. I served 10 years as a member of the Supreme Court's Committee on Civil Procedure and have written extensively in this field. I would say that of the essays that I have written the only one you might seriously find useful is an essay on the history of the Federal jurisdiction in the colonial period, leading up to the Constitution. I am the only fellow you know who can honestly say that he has personally read every reported case in the American Colonies prior to 1789, and that is less impressive than it might be because there were not an awful lot of them. In any case, I went through them from the standpoint, amongst other things, of the origins of the diversity jurisdiction.

The other fact that perhaps is relevant as a qualifying thing is that I have handled legal problems or lectured on legal subjects in about half of the States of the Union, and I think I am reasonably well acquainted with bar attitudes, feelings, and experiences around the country.

Senator, I am appearing here today in opposition to that part of the proposed provision of the code which would transfer—Well, let us be precise on the figures. Let me interrupt myself. Your staff has done a great job, and they have gathered a lot of statistical matter, and I have attached my own extrapolations from the figures they have gathered at the table with my statement which I have given you. And that would show that there are approximately 19,500 diversity cases filed in 1970, and that approximately 14,000 will be transferred to State courts if this measure were adopted. Now, I want to say “approximately,” and qualify, because to reach the 14,000 figure we are prevented, from available sources, from making certain refinements, and I think it might well come down to 13,000-plus if we could; but it is in that zone.

So, what we are talking about is a bill to move about 13,000 to 14,000 cases out of the Federal courts to the State courts, and I appear in opposition to that proposal.

Senator, I want to make very clear that this is not to be regarded as general opposition to the ALI proposal. It is, in other respects, a grand proposal. As a member of the ALI, I voted for every part of it really except these two sections.

On the other hand, this is a very basic part of it and goes to the heart of the thing, and I do, therefore, expressly oppose sections 1302(a) and 1302(b).

Now, Senator, I am appearing for the Committee for Diversity Jurisdiction, and I would be grateful, if you have a copy of my statement handy, if you would turn to the letterhead, because I would like to identify the people who are there shown, and they have been selected very deliberately to reflect the different viewpoints which coalesce in the group I am representing here today.

First of all, representing the academic point of view, the teachers, you met Professor Moore yesterday—and doubtless know him anyway—and you met Professor Fink yesterday and have heard from them.

Now, for the practitioners. Let me really make a statement which is a bold one, and I stand on it: You will not find any appreciable practitioner support in America for this proposal. You will find over-

whelming opposition. For the practitioners, we have put in three people from the general practice. First, Mr. Albert Jenner, who you must know. He was chairman of the ABA Committee on Judges for a long time. Mr. Jenner is, in my book, about as great a trial lawyer as America has. He has the largest litigation firm in Chicago, has a national practice, and you know him anyway.

Alston Jennings of Little Rock, active in the American College of Trial Lawyers, is a very seasoned practitioner and is the chief litigation partner of the immediate past president of the American Bar Association, Mr. Ed Wright. Mr. Jennings told me that his inclusion here may be regarded as an inclusion of his whole office, and Mr. Wright has confirmed this to me as to himself. I have also made bold to include myself with that group of practitioners.

Next is Mr. Samuel Langerman of Phoenix. Mr. Langerman is the past president of the American Trial Lawyers Association which is a group of some 20,000 lawyers who are virtually the plaintiff's bar in the United States. That group will be represented here this morning by Mr. Wayne Smith, a committee chairman for that body.

So, up to this point, we are identifying the opponents as:

No. 1, certain persons from the academic community;

No. 2, general practitioners in America, and

No. 3, representatives of the plaintiff bar.

No. 4 is the corporate interests of the country, because this bill is a solar plexis punch to the national corporations and the large regional corporations of America, and, therefore, two other members of our committee are Mr. William Gossett—whom I assume you know—who was general counsel of the Ford Motor Co., and is a past president of the American Bar Association and who now is practicing in Detroit; and Mr. Carlisle P. Myers who is general counsel of the Westinghouse Co., which is typical of the national corporations which would be severely handicapped by this bill because they have establishments in every State and would be knocked out of diversity altogether by this proposal.

Finally, the remaining group which takes this point of view are representatives of the State judicial systems who resist having 13,000 or 14,000 cases shoved over to them. Typical of that point of view is Chief Justice Kavanagh, of Michigan, who has joined on this committee and who has sent a letter to this effect to Senator Hart of this committee, which is attached to the supplemental statement which I am giving you today.

So, if I may sum it up, those who would wish to delete section 1302 (a) and (b) are practitioners generally; those representatives of corporations which now can utilize diversity, the plaintiff's bar, a respected segment of the academic community, and I suspect before you are done you will be hearing from most of the States throughout the Nation, through their courts as well as through their bars, taking essentially this point of view.

Now, let me turn, having identified as I have these members, to identifying a little more fully the State bar interests specifically and the particular chief justices who have written. In this case, the supplemental statement I have given you contains, first, the letter of Hon. Richard P. Chambers, the chief judge of the Ninth Circuit Court of Appeals. You will notice that the letter is dated "1964." Now, why? Because this proposal was in the works in the American Law Institute

for a period of years, and the leading proceduralist on the west coast, Mr. J. E. Simpson, of Los Angeles, as chairman of the bar committee for the Ninth Circuit, was in touch with all of the State bars, and the various letters to him from the State bars which then took positions are now submitted to you, along with Judge Chambers' letter, which happens to be to me. Senator, I want to make clear that, while those letters and resolutions may be dated in 1964 and 1966, I am authorized to state that I, in every instance, have been personally authorized within the last few days by the president of the State bar involved—or in this case, Judge Chambers—to present these now as reflecting the current and unchanged views of those groups.

You have there the letter from Judge Chambers, the letter from Chief Justice Strutz of your own State—and I may add that the bar of your State, insofar as I am aware of, its view, I think, very generally shares the same position I am taking here.

Senator BURDICK. Has there been a plebiscite in my State?

Mr. FRANK. There has not, as yet, Senator. I have had vigorous communications from a Mr. Lashkowitz of your State who I know only by telephone, and, as a member of Mr. Smith's organization, and he has been in touch with some of the defense bar as well. But I cannot, personally, authoritatively, state as to the views of that group. I assume, however, that all bars will want to be heard, and that one as well.

There is a letter from Chief Justice Roberts of Florida to Senator Gurney. There is a letter from Chief Justice Kavanagh of Michigan, and there will be—and it may already have arrived with Senator Hruska, but Chief Justice White of Nebraska has told me that he is joining in the views of Chief Justice Kavanagh and of the others, and that I am authorized to say, if Senator Hruska did not hear from him yesterday or this morning, that he promptly will.

Senator BURDICK. Do you know of any State bar associations that have passed any resolutions on this question?

Mr. FRANK. Yes, Your Honor, I am presenting them. I appear for the Arizona State Bar, which is my own State, which has passed a resolution in opposition. I appear for the Oregon State Bar which has expressly, by an express request of its president, Mr. John Schwabe, given a couple of days ago, a resolution of its position.

Senator BURDICK. A resolution of the association, itself, in its convention?

Mr. FRANK. Yes, Your Honor, the resolution of the State Bar of Arizona and the State Bar of Oregon. The resolution of the State Bar of Arkansas was forwarded along with the letter of Mr. Joe Barrett of that State.

I would like to say just a word. Joe Barrett represents, to me, about the greatest there is in America, as a practicing lawyer from Jonesboro, Ark., who has devoted himself to legal services and improvements. A fine man, and I am told also, if I may add, Senator, that the current chairman of the relevant committee of the Arkansas State Bar, I believe, has discussed the matter with Senator McClellan in the last few days, but I cannot personally vouch for that. I am merely told it is so.

A statement and a position of the Hawaii State Bar was adopted by that bar and was forwarded and authorized by its president, and the letter, resolution, of the Washington State Bar was adopted there.

Senator BURDICK. Mr. Frank, I still have not gotten an answer to my question.

I notice on this resolution from Arizona that it says:

"Resolved: that in response to the request of the Ninth Circuit Conference, the Board of Governors of the State Bar of Arizona herewith approves and adopts * * *"

My question was: Has any resolution been adopted by the bar association in its annual meeting?

Mr. FRANK. And the answer to that question, sir, is: Yes, and I believe the one from Arizona was, in fact, approved by the State bar, and the one from Hawaii, Oregon, and Washington are distinctly of the State bar itself.

Now, let me qualify: I was requested to appear here on behalf of the State Bar of Utah. The State bar of Utah has adopted its position by its judicial council and its board but it has not yet been ratified by the State bar as an organization.

But I believe, Senator, from my general impression of the matter, from around the country, that you may reasonably assume that you will have heard from at least 40 of the 50 State bars before you are done, in opposition to this proposal. What I am saying, as a member of the bar and as a representative of bar groups, is that there is profound and widespread satisfaction amongst the bar of this country with the operation of the diversity system, and we are, therefore, respectfully asking that it not be wiped out.

Now, we have had here some talk about the historical aspects of the matter. Professor Wechsler, the director of the American Law Institute, mentioned, when I happened to be here last week, at the opening of these hearings, that Attorney General Mitchell of the Hoover administration had advocated a proposal somewhat like this. Now, this is perhaps as good a place as any for me to stress that, on the matter which is before you, sincere and good people differ. Senator, but there are no personal tensions. I am sorry to have to disagree with Professor Wechsler on this proposal. He is a very great scholar. He has been my friend for over 30 years, and he is a fine lawyer and a fine public servant. Professor Field has done a very good job of his work. And I have very great respect for Mr. Orison Marden, and on most things we agree. This simply is a matter on which good people can have differing points of view. I am coming back, if I may, before we are done, to the origins of those points of view, because it may interest you.

But I have interrupted here, because I was speaking of Professor Wechsler's remarks on history, and what I want to stress is that while one may find historically some support for this point of view, one also finds very strong opposition to it.

For example, Professor Wechsler cited the views of Attorney General Mitchell of the Hoover administration, one of the great Attorneys General of this century. Chief Justice Taft was the person most responsible for having Attorney General Mitchell appointed in the

Hoover administration, and I, therefore, note as a point of ancient history, that Chief Justice Taft was the leading opponent in his day of this very proposal. Taft told the American Bar Association that no single element in our governmental system has done so much to secure capital for the legitimate development of enterprise in the west and south as the diversity jurisdiction.

In 1928, Chief Justice Taft felt so strongly in opposition to the views of Attorney General Mitchell that he campaigned, in effect, all over the country to sustain the diversity jurisdiction as we had it then and as we have had it since 1789 and as we have it now.

Now, what I am trying to say, Senator, is simply that this is something that we have to make up our own minds on, obviously. We cannot follow our friends; we just have to make up our own minds and do the best we can.

Now, let me make clear that I am not saying that we should keep the diversity jurisdiction simply because we have had it since 1789. It is the oldest jurisdiction. What you are being asked to do is to repeal—in substance—section 11 of the Judiciary Act of 1789 which, until now, has been regarded as the foundation stone of the American legal system. This is not a total repeal, but it will be very nearly so.

What that act says in substance is that the people of different States should be allowed to sue each other in the Federal courts.

Now, I wish to join you and all sponsors in recognizing that if such a deadly thrust is needed and if there is good reason for it, then let us, by all means, do what has to be done. But what I am saying, Senator, is that when we are going to junk a system which has been part of the bedrock of the American legal system for 180-some years, there ought to be mighty good reasons, and I respectfully submit that that is the weakness in the case of the proponents here.

I do want to stress that prior to the decision of *Erie v. Tompkins* in 1938 there were profound reasons for opposition to the diversity jurisdiction, because under the then system, manipulation of the courts was almost invited, because you had one system of law on the Federal side and a different one on the State side. Some lucky souls could choose which body of law was going to be applied.

If I may personalize, Senator: I do not know when you went to law school. I went to law school in the 1930's. What happened was that during the 1920's and the 1930's there was a large-scale resistance to diversity because of the unsatisfactory results which were being achieved because of having different bodies of law applied in the two court systems, and the prime intellectual center for that point of view was a seminar of the then Prof. Felix Frankfurter at the Harvard Law School. I personally went to the University of Wisconsin, and I was brought up by—intellectually and in Federal jurisdiction—a Frankfurter protege, and when I left law school I, too, believed that diversity jurisdiction should be abolished because of the then abuses. I will not go into this, but I am sure you recall those abuses, and you know there were abuses.

But, Senator, in 1938, when the Supreme Court decided *Erie v. Tompkins*, it did successfully eliminate, by carrying it through from then until now, the heart of the abuses, so that what has happened has been that you are now getting a proposal, right now, in the year 1971 in which essentially the ghost of Mr. Justice Frankfurter rides

again, and you are getting a proposal which comes fundamentally from the Harvard and Columbia Law Schools and their graduates who had adopted this particular point of view as younger men. This is not to show the slightest amount of disrespect for that point of view. I do respect it, and I have the profoundest respect for the people holding that view. The point that I am making, Senator, rather, is that it is an exceedingly small point of view. If you look at the committee—and you did the other day. Senator Gurney taking Mr. Wechsler through the committee list—and if you go over that committee you will find that almost to a man these are the Harvard and Columbia people who are products of that seminar. And, indeed, until I raised the criticism on the floor of the ALI that there was not any western representation—and there was not, and Senator Gurney noticed that—then, the very able Judge Merrill was added. But at that point, the thing was pretty well frozen.*

So, what you are getting is a point of view. And, again, this is not an argument, and I do not, in a sense, wish to be taken as indicating any lack of respect, because there is not any. Indeed, I want to acknowledge that there has also been something of a Yale point of view which is the opposite of the view of the sponsors of this bill. Yale dean and later Chief Judge Clark of the Second Circuit, favored the diversity jurisdiction and opposed this plan. Judge Clark, usually credited as the prime author of the Rules of Civil Procedure, has been followed in this point of view by Professor Moore of Yale, and by me. While there are undoubtedly exceptions to the general diversity point of view among the procedure and jurisdiction men of the three universities, generally the Harvard and Columbia leadership have been anti-diversity and the Yale group has been pro-diversity. I mention the attitudes of the schools of thought only to put them aside. Of course, we are not playing here some kind of Ivy League football game. What is needed is to appraise the merits of each point of view without being overwhelmed on either side by who happens to express it.

Senator BURDICK. Mr. Frank, at this point, I thought we might discuss some of these points as you go along.

Mr. FRANK. I would be grateful. Please.

Senator BURDICK. I think you have testified that there were more reasons before Erie-Tompkins^a to take this position than there were after Erie-Tompkins because the substantive law now has been settled.

Are we not facing something similar now in the difference in procedure in rules of evidence in the various jurisdictions today?

Mr. FRANK. No, and I would like to go to that, please.

Let me wind up this thought and say merely this and then dive into your good question, because it is at the heart of what I want to talk about.

What I am trying to say, Senator, is this, that you would not find any appreciable number of practicing lawyers in America under the age of 50 who think there is any sense in this proposal at all. Now, I am speaking of people who are regularly engaged in litigation as a way of life. You have not heard from any, and I respectfully submit the reason you have not heard from them is because there are not any. On the contrary, you will hear from the bar of the country overwhelmingly from those people who come, and have come, to their intellectual maturities since Erie-Tompkins. It is not mere coincidence that you

get six or eight States here, and, I repeat, you will hear from almost all of them, because what has happened is that the bar is highly content now, since Erie-Tompkins, with the way the system works.

Now, let me meet your point, please. One of the reasons that I, as one interested in all reforms as I am, so strongly oppose this and uphold the diversity jurisdiction is exactly what you are talking about. What happens is this, is that we now have one bar. It is a Federal question bar and a diversity bar and they are all mixed, and they practice in the State and the Federal courts, so that when I go to the calendar call as I do on occasion in the Federal court, I see the same people as in the State court. It is a unified bar. We would lose that if all we had left in the Federal courts were the Federal questions, and then all you would have there would be the tax people, the patent people, and so on.

Now, I am not evading your question, I come squarely to it. The point is that because we have a unified bar, Senator, and because we are all in both courts, ideas move back and forth, ideas for judicial administration, for procedure, and the rest.

Let me be concrete. I served for 10 years on a Federal Committee on Civil Procedure. I served for 15 years on the State Committee on Civil Procedure. What happens now is this: The Federal Committee can afford staff to spend \$100,000 or \$200,000 a year on giving that committee staff to do the lead work, and then what happens is that work is done there and then it is shared and adopted and used in the State courts. As a concrete matter, Senator, your State and mine simply cannot afford to do this work themselves; we have not the money; we cannot hire the people.

Let me be very concrete about it. My State happens to be the No. 1 State in the Union for following the Federal rules. We were the first to adopt them when they were originally promulgated in 1937. We have been the first to adopt every change since. I have spoken all over America myself in favor of extending the Federal rules to the States, and it is happening. Somewhere between 20 and 30 States are now using the Federal rules and are getting the benefit of this system, right now, at the present time. The number increases all of the time, and the number that take all of the system are fewer than that, but the number taking whole hunks is large. For example, they may make a complete adoption of the Federal discovery rules. You get whole units like that, Senator.

I hope I am reaching you with this which, to me, is a vital point and one of the reasons, essentially, I cherish diversity is that it permits this interchange.

The interchange is not all one way. It is because there is a common bar in each State that ideas move from the State system to the federal system. In this paper which I am not going to speak to, obviously, to your ear—it is before your eye, anyway—I have given concrete illustrations of ideas that have moved from the federal system to the State system and where ideas have moved from the State system to the federal system, and I, personally, know of no more destructive aspect of this legislation than the fact that in my best judgment, with a lifetime of involvement in these activities, that it will destroy that migration of ideas which now is the product of having an integrated bar with the same people on both sides.

So that what we find now all of the time is a tendency to bring them more and more together and to take the best out of each of the two systems, and I, personally, in every paper I have given on this subject and in this one today, rely on that as one of the largest single values of the diversity system.

Have I answered your inquiry, sir?

Senator BURDICK. No.

Mr. FRANK. Please push.

Senator BURDICK. Because you said before Erie-Tompkins there was a lot of jockeying around to get the forum that best suited your case. There is still a lot of jockeying around to get the forums that have the best rules of evidence.

Mr. FRANK. Let me, please, meet that more squarely, and if I fail to do so, I appreciate the question, and it is my one chance to talk to you on behalf of our committee and I am grateful for being pushed.

Before Erie-Tompkins, we had different bodies of substantive law, so that if it was a corporation that thought it could get better commercial law, it could then choose, and it was unfair to the other people. That was wrong. The Black and White, and Yellow Taxi case, and so on, and those similar cases were outrageous. Now, that is eliminated, and what happens instead is that there may be some differences in procedure but they are not radical differences, and while the differences exist, they are also now pressures toward bringing the systems procedurally together, and that is where the ideas flow back and forth, and I, personally, have seen it.

So, for example, if I may be concrete, the Federal discovery practice has now migrated into the States. On the other hand, the matter of expert testimony is an instance in which the State expert practice has migrated into the Federal system. Those are concrete illustrations that I have observed with my own eyes, and that kind of migration, that free flow of ideas, is what is going to disappear when we have a specialized bar that knows taxes and fair labor standards, and that is all over in the one system and the general civil litigation bar of America in another system. And that, I think, would be unfortunate in the very extreme.

Senator BURDICK. What you are saying is that the procedure and evidence will become uniform in time?

Mr. FRANK. They become uniform very rapidly in time, and I have given you a concrete example.

Since 1937, the Federal rules have largely migrated into the States overwhelmingly. The reporter for those is a professor from my own hometown. The chairman of that group is Mr. Jenner who is on this diversity committee. They have been drawing from State practice, and their conclusions go back to the State practice, and they do because diversity is the invaluable link that makes this possible. That is the means of communication. If you took it out, you would stop the communication, I believe.

Now, let me say one last word on the historical aspect.

Am I taking more time than you want, Senator?

Senator BURDICK. Well, we have two more witnesses, I guess, before noon; so, govern yourself accordingly.

Mr. FRANK. All right, I will speed it up a little.

I have only a few more points that I would like to make.

The question of the element of prejudice and that phase of the matter. We are told that diversity was originally created because of a fear of interstate prejudice, and that since those interstate prejudices do not exist any more we do not need it any more. I am prepared to agree, Senator, that the prejudice has markedly diminished, but the fact remains that there is enough left, particularly of intrastate prejudices where being in one part of a State or another makes a difference. You find here a letter from Judge Chambers saying that because of that kind of thing, which I suspect may exist in your own State, too, there are pockets of a State where, with a given case, you would rather not be there if you could avoid it for reasons of just plain prejudice. The State Bar of Hawaii reaches you particularly on that score by saying that they have an awful lot of new people who have become very recent residents and, in their judgment, in their peculiar situation this makes a difference. This is particularly unfortunate, and Hawaii is especially anxious to keep their Federal alternatives.

Now, let us turn to the matter of what are the criticisms of diversity. There are, I submit, very few of them. You have not been hearing here, I do not believe—and I think I have read all of the statements—any serious criticisms of the diversity jurisdiction other than the fact there are a lot of cases, and the sponsors would like to move them out. This thing goes to the matter of the problem of dumping the stuff from the Federal side over to the State side.

May I use phraseology which, at least, would have been meaningful in my home State of Wisconsin and I suspect yours in North Dakota, and that is, Senator, that there just plainly is not any good in moving the manure from one pile to another pile, particularly when the second pile is bigger. All we are doing is making it worse. What this is, is a matter of moving some 13,000 or 14,000 cases off of one logjam onto another logjam, and, from the standpoint of the States involved, you get a considerable unwillingness to receive them.

Let me direct your attention to the top of page 15 of my own statement so that we can see exactly what we are talking about here. There is a table down there. Now, let me tell you what that table is taken from. I have taken two documents. One is the calendar studies of the Institute of the Judicial Administration which is New York University and the other is from the annual report of the Director of the Administrative Office of the U.S. Courts. These are not quite parallel, and I put the qualifications into the text, but this will give you the feel of it. But what this proposal would do to people, Senator, to human beings who have problems that need solving is: Take a case of a situation in Chicago, from a 14-month docket, and move it over to a 61-month docket, that is, from a year and 2 months to 5 years. In Jersey City, it is from 26 to 35, and so on. I have given you the parallels here. But what it means is that a bad situation is being made far worse by this proposal.

Now, there will be isolated instances where that will not be true, and in the interest of fairness I put one of those in. You will see that in Memphis there will be a 1-month improvement. But here is the point, Senator, in major litigation centers of America, where most of it is, we will be making docket delay far, far worse than it is now.

We then come to this point, and this is the point which you have covered in correspondence with your own Chief Justice Strutz in your own State. The fact of the matter is that of the 13,000 or 14,000 cases

to be moved they tend to be concentrated in relatively few States. The number which will be transferred is shown on the table, Senator, which I have attached to my own statement, which is your table with the right-hand column added to it showing the number that would actually be transferred. Alabama would get 500 more, Illinois would get 700 in round numbers, Indiana 500, Louisiana 600, Michigan about 500, New York 1,100, Pennsylvania 1,300, Texas 1,100. Those are the ones that get the weight of it. So, the point that is being made and that was made by you in your letter to Chief Justice Strutz is that the number which will be transferred to the smaller States, those with the less population and the least litigation, will be relatively small. This, in turn, leads to the response which is made by the bar of Hawaii who says, with vigor to you in the papers which are before you, Senator, "This is wrong." What you are doing, if this proposal passes, is, for the sake of relieving Federal dockets in perhaps five eastern States, destroying a satisfactory, working system in the other 45 States where everybody is content with it.

Now, the fact remains that when the 13,000 or 14,000 cases are moved, they do go to the States dockets, they do add to the problems of the State administration, and the sorry part of it is from a personal standpoint, from a human standpoint because most of these are concentrated, they occur in areas where the State dockets are even worse than the Federal dockets. And by far, to me, the striking point of the table which is at page 15, is this fact.

Your Honor, let me wind it up with this point of view, and, then, a few quotations, and then if you have questions I would be grateful. What we are saying, as I personally feel, is this :

The Federal Government has provided services for its people since 1789. Today, for example, there is the school lunch program, there are highway programs, there are whatever other programs you personally may have sponsored and supported. Those are programs in which simply the Federal Government is providing a service. Now, as it happens, Senator, the very oldest service which the Federal Government has provided its people is a dispute-settling service, and this is a service which, for the last 40 years or thereabouts, has worked remarkably well and to the general satisfaction of all. Hence, you do get responses such as that of your own Chief Justice who says: "Insofar as the bill would merely shove many cases from Federal courts to State courts, we oppose." Or Chief Justice Roberts of Florida, who says, simply, that he would leave the diversity jurisdiction statute just as it is; or any of the others which you may have.

But the point, at least, that I would make, by way of conclusion, is that we have in the country now a terrible logjam of litigation. It may be that we can find ways of improving that situation. I do not know if I have ever wished off on you a copy of a book of my own, lectures that I gave at the University of California on the dedication of the Earl Warren Legal Center, called "American Law: The Cause for Radical Reform." But we need radical reform; we need simply to make this job manageable. If, for example, you wish to adopt legislation which will eliminate cases altogether as, for example, hypothetically, you may or may not conclude to do something about auto accident litigation, at that point you may reduce the total volume. But, Senator, there is not any good in simply shoving it from one pile to another, and it does a great deal of harm.

Thank you.

Senator BURDICK. Well, that is one of the questions we have got before this committee, how big the pile is. You seem to think it is a large pile and the proponents claim that it is a very minimal pile. (The prepared statement submitted by Mr. Frank follows:)

STATEMENT OF JOHN P. FRANK

(Mr. Frank appears in behalf of the Committee for Diversity Jurisdiction, the State Bars of Arizona, Oregon, Hawaii, Utah, and Washington. He presents letters and resolutions from the courts and bars of these and other states.)

Resolutions and letters presented by Mr. Frank are as follows:

1. Letter from the Honorable Richard H. Chambers, Chief Judge of the Ninth Circuit Court of Appeals.
2. Letter of the Honorable Alvin C. Strutz, Chief Justice of North Dakota.
3. Letter of the Honorable B. K. Roberts, Chief Justice of Florida.
4. Letter of the Honorable Thomas M. Kavanagh, Chief Justice of Michigan.
5. Letter of the Honorable Paul White, Chief Justice of Nebraska—forthcoming.
6. Resolution of Arizona State Bar, authorized to be presented by President Howard Karman, Arizona State Bar, October, 1971.
7. Resolution of Oregon State Bar, authorized to be presented by President John Schwabe, Oregon State Bar, October, 1971.
8. Resolution of Arkansas State Bar, authorized to be verified September 30, 1971, by Mr. Joe C. Barrett, Jonesboro, Arkansas; letter attached to this statement.
9. Letter statement of position of Hawaii State Bar, authorized to be presented by Mr. Leslie Lum, present President of the Hawaii State Bar, October, 1971.
10. Report of the Washington State Bar, authorized to be presented by Mr. Fred Velikanje, present President of the Washington State Bar, October, 1971.
11. Resolution of the Vermont State Bar.
12. The Resolutions of the Judicial Council and the Executive Committee of the Utah Bar are unpublished.

My name is John P. Frank and I am a practicing lawyer in Phoenix, Arizona. I appear for the Committee for Diversity Jurisdiction and, independently, as an official representative of the State Bar of Arizona. I am a graduate of the University of Wisconsin Law School, with a graduate degree from the Yale Law School. I was law clerk to Mr. Justice Hugo L. Black at the October, 1942, Term. I have been a professor of law, including particularly procedure and federal jurisdiction, at both Indiana University and at Yale University, and have been a lecturer in law at the University of Arizona, Arizona State University, and the University of Washington. For the past seventeen years, I have been primarily a practicing lawyer in Phoenix with extensive experience in state and federal courts. From 1960 to 1970, I was a member of the Advisory Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States, and I am the author of numerous books and articles, principally on legal and historical subjects; one article is regarded as a basic history of the original federal jurisdiction. My volume *American Law* contains lectures on problems of the reform of American law given at the dedication of the Earl Warren Legal Center at the University of California. I believe that I am generally acquainted with problems of law and law practice throughout the United States and have personally handled legal problems or lectured on legal subjects in approximately half the states of the Union.

I appear today in opposition to that portion of the proposed revision of the Judicial Code which would transfer some 50 to 60 percent of the diversity cases to the State courts. I wish to stress that my opposition is solely to this portion of the proposed revision of the Judicial Code. As a member myself of the American Law Institute, I voted for all of the rest of the Code and support it. Nonetheless, this is a very basic portion of the proposal and the Committee has very sensibly decided to give separate and independent attention to it.

Concretely and specifically, I am in opposition to the proposed Section 1302(a) and Section 1302(b). I would eliminate them.

The Committee for Diversity Jurisdiction is deliberately chosen as a cross section of those in opposition to this plan. The sponsors of the measure estimate that something over 13,000 cases would be moved out of the federal system by this proposal. Section 1302(a) would eliminate a very large portion of the auto accident and other tort cases. Section 1302(b) would bar all national corporations from diversity jurisdiction anywhere, and as a practical matter, would also bar most regional corporations in the case of any suit which is very likely as to them. The measure, as I have noted, would transfer a very large number of cases to the state courts. Quantitatively, this would be far and away the biggest shift of cases in American history.

The Committee reflects these elements. First, there is some academic resistance to the proposal. Professor J. W. Moore is the senior specialist on federal courts and federal jurisdiction in the United States, and is the author of *Moore's Federal Practice*, a work which every member of this Committee will have used many times. Professor Pink of the University of Illinois has been deeply interested in this topic and is an expert concerning it. Mr. Gossett, former general counsel of the Ford Motor Company and President of the American Bar Association, represents the general practitioners who are corporation law specialists, and Mr. Carlisle P. Myers is the general counsel of the Westinghouse Company. Mr. Albert Jenner of Chicago, who is one of the foremost litigation lawyers in America, was President of the American Judicature Society and is presently Chairman both of the Commissioners of Uniform State Laws and of the Committee on Uniform Rules of Evidence of the Judicial Conference. Mr. Alston Jennings of Arkansas is a distinguished litigation man of broad experience who is, incidentally, the senior litigation partner in the firm of the most recent President of the American Bar Association. Mr. Samuel Langerman is a former President of the American Trial Lawyers Association, the principal organization of auto accident lawyers in the United States. Chief Justice Thomas M. Kavanagh of Michigan is himself active in the reform of judicial administration and represents what I believe will be demonstrated to be a very general state point of view.

I know of no substantial reason that is or can be advanced for this proposal except the commendable desire to lighten the load on the federal courts. The difficulty with lightening that load is that necessarily the load must be increased on the state courts. We see no profit at all in transferring cases from one logjam to another.

This proposal is, essentially, to repeal Section 11 of the Judiciary Act of 1789. That statute, based in turn squarely on the Constitution, provided that, "The Circuit Courts shall have original cognizance, concurrent with the Courts of the several states, of all suits of a civil nature at common law or in equity where the suit is between a citizen of the State where the suit is brought and a citizen of another State." This bill would eliminate about two-thirds of that jurisdiction, or some 14,000 cases. (See the Table at the end of this Statement.)

In this connection, we have had some talk about historical aspects of this subject. Professor Herbert Wechsler, Director of the American Law Institute, has mentioned that Attorney General Mitchell in the Hoover Administration advocated some proposal such as this. This is perhaps as good a place as any to say that I deeply regret having to disagree with Professor Wechsler on the general merits of this particular proposal. He is a great scholar, lawyer, and public servant and has my most complete respect and affection. May I also add that Professor Field of Harvard, the Reporter of this part of the *Restatement*, has done a very excellent job as to which I pick no technical faults. But a glance at distant history demonstrates that this is a matter on which reasonable people can differ. The then Attorney General Mitchell did have the point of view attributed to him. Yet Chief Justice Taft, who was principally responsible for the appointment of Attorney General Mitchell and admired him very much, had the opposite point of view. In 1922, Taft told the American Bar Association that "no single element in our governmental system has done so much to secure capital for the legitimate development of enterprise, throughout the West and South," as diversity jurisdiction. In 1928, Taft energetically reached out over all the country to oppose a proposal like this one. Professor Mason in his excellent work on Taft as Chief Justice tells, for illustration, that a newspaper such as the *Florida Times Union*, as a direct result of Taft's stand, noted editorially "emphatic protest against the bill."

What all this means is simply that we must make up our own minds.

The country has utilized this jurisdiction since 1789. If now it should go, let it go. We must not shrink from warranted change because it is drastic, and habit must not be elevated to principle. But surely, if we are to make this change there ought to be clear-cut good in it, and I know of none.

The diversity system is working well throughout the country, or at least as well as any system can work in the light of the law's delays. Procedures are generally satisfactory, results good. If there is anywhere a complaint against the operation of the diversity system based on an assertion that injustice is being done through its working, I have not heard it. In my own jurisdiction, Arizona, I took an informal poll of leading trial lawyers throughout the state, largely restricted to practitioners who are in some court or working on some litigation, state or federal, almost every week and usually every day of their lives. More than 80 percent report a desire to keep the federal jurisdiction intact, and of the minority, not one complains of any injustice under the present system. This, in a jurisdiction which can usually justly claim to be alert to need for change, and which on matters of procedure is one of the most progressive in the country. The Arizona State Bar officially and unequivocally opposes this plan.

A. HISTORICAL CONSIDERATIONS

It must be freely conceded that the diversity jurisdiction originated in premises of dubious validity and that it has survived a series of gross abuses, now largely corrected. The original federal court jurisdiction was almost entirely permissive; the Congress was under no obligation to create federal trial courts at all, and could have left all original matters except those in the Supreme Court to the states. And yet the Constitution did permit the creation of federal courts and the grant to them both of diversity and federal question jurisdiction, and the first Congress did choose to take up the option. It granted jurisdiction for private, civil cases in diversity only.

Why? The need arose from a fear of prejudice against out-of-staters engaged in regional business. I have developed in some detail elsewhere, based on a study of all generally available pre-1787 reports, that this was largely a gloomy anticipation of things to come rather than an experienced evil; but nonetheless, there it was.

The diversity jurisdiction in the first 150 years of its life had its successes and its failures. The successes were substantial—the disposition of a good amount of important commercial business; the furnishing of the Supreme Court with enough to do to keep it busy and finally more than busy, thus permitting it to develop as a national institution; the nationalizing effect of the entire judicial operation which, to a degree at least, helped unify the country.

But the abuses were serious. First, jurisdictional manipulations furnished an easy device for depriving states of initial opportunities to pass on matters of their own policy. Second, the class biases of federal judges led to gross abuses both to the growing labor movement as an institution and to the rights of injured workers in an expanding industrial economy. Third, the great error of *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842), and the federal choice of law permitted the abuse of jurisdiction shopping. It invited the manipulation of cases to put them where the results would be controlled by the choice of court.

If these abuses could not have been controlled, the abolition of the whole diversity jurisdiction should have followed. But creative leadership did devise controls, and the abuses were very largely eliminated. The legitimization of federal question litigation in 1875 eliminated much of the purpose of phony diversity intended to raise federal questions. Such decisions as *Hawes v. Oakland*, 104 U.S. 450 (1882), helped check the gross abuse of the manipulated case. More fundamentally, the Johnson Act largely took the federal courts out of the utility regulation field, and case developments following its policy have greatly minimized the conflict of jurisdictions. In the labor relations field, the Equity Rules of 1912 were some improvement, but not nearly enough; the Norris-LaGuardia Act in 1932 largely ended government by injunction. In the tort cases the rise of industrial compensation, the passage of the FELA and Jones Act, and the general revitalization of juries by the Supreme Court has almost totally eliminated the earlier abuses. Finally, *Eric R.R. v. Tompkins*, 304 U.S. 64 (1938), has largely ended the evil of jurisdiction shopping. There will never again, we trust, be another case like *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

Nonetheless, these abuses leave a residue which contributes to the present push for great change. The past evils in diversity are not evils of an ancient yesterday. Most of the cures are the product not only of this century but of the years since 1930. These abuses were gross enough to warrant, if necessary, the total abolition of diversity. Able and impartial observers for the years 1890 to 1930 could very reasonably develop severe prejudices against this jurisdiction. They did, and many of them have greatly influenced the thinking of the present advocates of change.

But the major premises of that prejudice deserve tight reexamination. It is possible—I think it is true—that the abuses of diversity have been pretty well filed away, and that what is left is a worthy and useful device of public administration. The anti-diversity attitude has become a habit. Those who wish to terminate, suspend, or cut down this valuable federal service would do well to reexamine and restate their major premise in depth. One hears the phrase, “an idea whose time has come.” This is an idea whose time has gone.

B. THE VALUES OF DIVERSITY

The first great value of diversity is its disposition of something on the order of 15,000 disputes a year to the general satisfaction of those who need their disposition. Of course not all litigants are content with results; doubtless human impulse leaves at least half of them unhappy. Nor are all federal judges wiser or abler or all federal procedures more satisfactory than state procedures. The federal bench has its share of incompetents, tyrants and fools; I can personally recall appearances before some of each. Occasionally a region or area, in which highly political appointments have been made in response to local and occasionally unworthy political impulses, found itself with a wholly inferior bench. Some federal procedures, such as the restriction of cross-examination to the scope of direct, may be inferior to state procedures.

Hence I recite here no cult of the superman. But, with a high degree of uniformity, the system has been generally satisfactory to those living under it. The litigant who loses rarely feels with much conviction that he would have been better off in a different system. Where political considerations make the federal judges poor, they are likely to make the local judges even worse. There is a general feeling that justice in federal courts is being well administered. There is no widespread, obvious abuse to be corrected.

The second great plus is the educational value of having two systems in interaction. This value is felt at both national and local levels. The success of the federal rules has led to their widespread emulation in the states, and the federally sponsored process of continued revision is keeping the state procedure moving as well. This process is of tremendous importance because the necessary spadework on procedural studies may require national attention and national subsidization. The costs of a discovery study, as is now in progress in the federal system, could not be easily borne locally. And interaction is by no means a one-way street. The present practice encourages the federal system to borrow state improvements and experiments. Many of the recent changes in federal procedure came from the states. A recent change in the federal rule on process stems from progress in Illinois; an impending change in parties from developments in Michigan; and a recent change in directed verdict procedure from a predecessor rule in Arizona. In Arizona again, pretrial procedures flow back and forth between the systems. The state practices on the time and manner of taking exceptions to jury instructions are working their way into the local federal practice, and certain federal devices of encouraging a business-like disposition of cases find their way back to the state court.

Those who would drastically cut the diversity jurisdiction do not doubt the validity of the point made here. They think merely that there will be enough federal business left to permit the same effect. The proposition is not demonstrable one way or the other, and I can only say that I do not myself think so. We need the substantial bulk, the regular exposure to concurrent jurisdiction, to get the best effect of the interaction. The federal question cases are more likely to be for specialists in antitrust or FELA or taxes. The inclusion of the full gamut of commercial and tort cases puts the whole litigation bar into federal courts.

Finally, there are elements of prejudice and competence deserving to be taken into account. A native given the practical alternative of having his suit against an out-of-stater in a particular county of his state system may well conclude that

speed, ability, impartiality or plain convenience will be best served in the federal court. The out-of-state defendant is normally not hurt by this judgment, and the whole cause may benefit from it. There are other prejudices than the merely regional, and a litigant may believe that he escapes some of them in federal court. The suggestion has been made that the litigant, if dissatisfied with his state justice, should improve it, not escape it; but this is visionary. The litigant has a problem which needs solving now, not in the time of the Messiah; and maintaining a concurrent system is one way of developing improvements in each of them. I attach a letter from Judge Richard Chambers, the Chief Judge of the Ninth Circuit, who opposes the legislation and expresses this point of view as to the proper and legitimate fear, today, of local prejudice.

C. THE CRITICISM OF DIVERSITY JURISDICTION

There are astonishingly few criticisms of diversity jurisdiction, and these are almost entirely unsupported by data or stated experience. First and most fundamental is an act of faith, an accepted and unexamined major premise that "state cases belong in state courts." This assumes a good deal. It assumes that there is such a phenomenon as a "state case," a kind of provincial fracas which should be kept happily local and free of federal contact. Why? In one week, I have filed a brief with the NLRB on whether three butchers in a local meat market should be classed with the Retail Clerks or with the Meat Cutters Union; prepared a complaint to the Labor Department in behalf of one plumber who appears not to have received his entitlement to back wages; and scheduled a deposition in a \$250,000 diversity case. My partners meanwhile processed securities matters, problems of the regulation of the distribution of blood plasma, and a question concerning the construction of a county road before other federal agencies. What is there in the genius of American government by which some of these dispute-settling functions may be absolutely required to be federal, while the quarter of a million dollar law suit should not be federally settled even if one or both parties desire it?

Second is the ventriloquist's dummy criticism, the suggestion that requiring federal judges to be mouthpieces for state law will depreciate the quality both of justice and of those willing to participate in declaring it. This may have merit. When *Eric R. R. v. Tompkins*, 304 U.S. 64 (1938), was decided, many of us worried about it for a time, and will recall a general fear during the 40's that the decision might strangle creativity on the federal side of the bench. But by now this is a problem which, if problem it be, is beyond mere nervous fussing. The evil, if any, should be demonstrable. How many federal decisions show an atrophy of creativity for this reason? What are they? What good men have refused the office for this reason? How many?

D. THE EFFECT ON THE STATES AND THE LITIGANTS

Viewing the matter overall, what is the virtue in taking cases off a crowded federal court docket and dumping them on a crowded state court docket? This proposal, I submit, is a kind of jurisdictional variation of the old three shell game. You will remember that at the carnivals the sleight-of-hand man stood behind three walnut shells, the pea went under one shell, and then it vanished—it was never under the shell you expected it to be under. This jurisdictional proposal has only half the magic of the three shell game—these 14,000 cases are going to disappear from under the shell of the federal walnut, but there is no doubt as to where they are going—they are simply moving over to a state court shell. Generally speaking, the areas which are behind are behind in both their federal and state court dockets. I see no merit whatsoever in moving a case from a federal court docket where it may have to wait two years for disposition to a state court docket where it may have to wait four.

The practical result of the transfer in terms of what it will do to the litigants themselves is best demonstrated by comparison of the state and federal statistics. I take the state statistics used here from the publication of the Institute of Judicial Administration called *Calendar Status Study 1971* and the federal information from the *1970 Annual Report of the Director of the Administrative Office of the United States Courts*. A comparison of the areas covered by both sources, state and federal follows. The comparison cannot be perfect because the Institute figures are restricted to personal injury cases and the federal figures cover all jury trials. Moreover, the geographic areas are not precisely identical in both instances. That is to say, the Institute figures are by counties and the federal figures are by judicial districts. Nonetheless, I have chosen illustrations which are essentially identical.

TABLE OF WAITING TIME STATE AND FEDERAL

City	State, months	Federal, months
Chicago.....	61.7	14
Brooklyn.....	51.9	16
Manhattan.....	49.9	27
Philadelphia.....	46.8	37
Jersey City.....	35.6	26
Boston.....	35.0	15
Detroit.....	34.3	23
Los Angeles.....	24.3	12
Minneapolis.....	21.4	5
Cleveland (1970).....	27.8	20
Memphis.....	9.9	11

Using these figures as an illustration, the litigant would be put approximately a year and one-third farther behind by having his case forced over from the federal to the state court.

Chief Justice Kavanagh of Michigan has taken a place on this committee as representative of the state point of view which does not want this load put on the already overburdened state systems. It is quite possible that I will have heard from other state sources before appearing to make this statement, and I reserve the right to offer other illustrations at the hearing. However, the point of view is well expressed by Chief Justice Alvin C. Strutz of North Dakota, a copy of whose letter I attach, and who says:

"Insofar as . . . the bill would merely shove many cases from the Federal Courts into the State Courts, we would oppose the legislation."

As Chief Justice Strutz also says:

"State Courts at the present time also are finding it very difficult to keep up with their caseload without having hundreds of additional cases, which now are processed by the Federal Courts, shoved into the State Courts. I do not believe that this type of legislation would in any way help the courts to clean up their backlog of cases. All that it would do would be to decrease the caseload of the Federal Courts and correspondingly increase the caseload of the State Courts, which are far less able to carry the additional burden.

"I trust that your Subcommittee can come up with some real solutions to the problems which face both the State and Federal Courts, Quentin, but not by merely shifting the load from the Federal to the State Courts. That, in my opinion, would be no solution at all."

The Chief Justice of Florida, B. K. Roberts, has written a profoundly thoughtful letter to Senator Gurney which I attach. In it he says:

"(1) Leave the diversity of jurisdiction statute just as it is.

"(2) Create about 250 new United States District judgeships of a roving nature, to be assigned by the Attorney General, for a term of six years but who would have the first claim on any vacancy occurring in their home district.

"(3) Make available to the state governments, with no strings attached, sufficient funds to increase their judicial power by one-third upon temporary judgeships being created in the state somewhat along the same lines as mentioned in recommendation two."

I also present a resolution of opposition from the Oregon State Bar, at the request of Mr. John Schwabe of Portland, Oregon, the present President of that bar. This resolution is of special importance because the matter was very fully discussed, in bar publications and otherwise, before the resolution was adopted.

I also present a resolution and letter from Mr. Joe Barrett of the Arkansas Bar. Mr. Barrett is one of America's most distinguished lawyers; the resolution was offered by a committee including two former Presidents of the Arkansas Bar.

I reserve the right to present other bar resolutions.

The diversity system provides a legitimate federal service to the people of the United States. There are federal services of varying degrees of utility and of necessity, such as the giving out of seed catalogs, the highway program, the school lunch program, Social Security. Each of us will have our individual attitudes about individual ones of these services and the hundreds like them. But of all these services, the diversity jurisdiction is the oldest. It is a federal dispute-settling service which has existed since 1789. The privilege of taking those disputes which involve citizens of different states into federal courts is a good, working system. We should preserve it, not because it is old, but because it is useful. We certainly ought not junk it.

I respectfully submit that the bill should be amended to delete the two sections under discussion.

TABLE OF DIVERSITY CASES AFFECTED BY SENATE BILL 1876, 1970 STATISTICS

[The 1st 5 columns of this table are taken from work done by the Administrative Office of the U.S. Courts for the staff of the Senate Judicial Subcommittee on Improvements in Judicial Machinery. Cols. 1 and 4 are the cases currently coming into Federal courts by diversity, either originally or by removal. The last column is the total of cols. 2, 3, and 5. It represents, in an approximate way, the cases which would be moved from the Federal to the State system by this bill].

State	Orig. div.	In State pltf.	Corp. pltf. doing bus.	Removed	Corp. defts doing bus.	Total transferred to State
	(1)	(2)	(3)	(4)	(5)	
Alabama.....	542	251	124	232	154	529
Alaska.....	48	19	15	12	11	45
Arizona.....	152	62	36	62	36	134
Arkansas.....	256	155	61	171	138	354
California.....	375	186	56	101	62	304
Colorado.....	242	86	22	30	10	118
Connecticut.....	176	68	7	17	8	83
Delaware.....	65	19	-----	1	-----	19
Florida.....	497	187	82	124	59	328
Georgia.....	508	184	91	141	75	350
Hawaii.....	71	24	2	4	-----	26
Idaho.....	53	17	7	17	12	36
Illinois.....	1,014	454	175	134	50	679
Indiana.....	868	382	101	72	40	523
Iowa.....	154	81	20	43	31	132
Kansas.....	201	86	30	98	48	164
Kentucky.....	221	110	34	100	41	185
Louisiana.....	830	502	77	95	66	645
Maine.....	55	26	4	5	4	34
Maryland.....	303	110	58	31	25	193
Massachusetts.....	281	169	55	69	40	264
Michigan.....	677	383	68	79	45	496
Minnesota.....	334	156	20	29	14	190
Mississippi.....	285	125	56	177	93	274
Missouri.....	342	119	102	180	95	316
Montana.....	63	38	5	39	9	52
North Carolina.....	280	123	39	57	31	193
North Dakota.....	38	15	6	9	8	29
Nebraska.....	139	51	19	8	5	75
Nevada.....	65	23	2	27	12	37
New Hampshire.....	83	33	5	10	2	40
New Jersey.....	470	140	50	85	66	256
New Mexico.....	146	56	35	38	19	110
New York.....	1,826	1,002	78	121	52	1,132
Ohio.....	697	376	85	86	56	517
Oklahoma.....	361	164	87	138	86	337
Oregon.....	260	154	31	25	17	202
Pennsylvania.....	2,027	1,201	136	51	31	1,368
Puerto Rico.....	364	284	5	21	6	295
Rhode Island.....	69	23	2	9	1	26
South Carolina.....	443	253	61	75	46	360
South Dakota.....	80	27	1	7	1	29
Tennessee.....	557	312	29	105	49	390
Texas.....	1,353	833	166	153	106	1,105
Utah.....	122	57	10	2	1	68
Vermont.....	259	103	4	2	-----	107
Virginia.....	651	365	46	67	31	442
West Virginia.....	201	88	20	118	70	178
Washington.....	154	94	39	40	37	170
Wisconsin.....	209	106	29	18	9	144
Wyoming.....	43	16	9	4	1	26
Total.....	19,510	9,898	2,302	3,344	1,009	14,109

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT,
San Francisco, Calif., January 21, 1964.

Mr. JOHN P. FRANK,
Title and Trust Building.

DEAR JOHN: Thank you for the copy of your article on diversity jurisdiction in the November issue of The Yale Law Journal. I had read the article in the law journal.

My objection to further curtailment of diversity jurisdiction, I believe, is within your statement. However, it grows simply out of a conversation two or three years ago with an able lawyer friend from a small county. He said that if I had had anything to do (which I hadn't) with raising the jurisdictional requirement from \$3,000 to \$10,000, he wanted to thank me because he said the

pickings on out-of-state motorists had gotten rather thin in his county, with inflation reducing \$3,000 to a small recovery. While he was laughing when he said it, he meant it.

Thus, I concluded that we ought to keep diversity jurisdiction a while longer.

Sincerely,

RICHARD H. CHAMBERS.

STATE OF NORTH DAKOTA SUPREME COURT,
Bismarck, N. Dak., September 20, 1971.

Re Senate bill 1876.

HON. QUENTIN N. BURDICK,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BURDICK: I have heard that the above bill, which I understand was introduced by you, will be considered by your Subcommittee of the Senate Judiciary Committee commencing on September 28. We have just requested that a copy of the bill be mailed to us, and, until a copy is received, we will not be in a position to comment definitely on all of the proposed legislation. However, we understand that the bill would radically restrict the diversity jurisdiction of the Federal Courts. Insofar as this may be true, and the bill would merely shove many cases from the Federal Courts into the State Courts, we would oppose the legislation.

State Courts at the present time also are finding it very difficult to keep up with their caseload without having hundreds of additional cases, which now are processed by the Federal Courts, shoved into the State Courts. I do not believe that this type of legislation would in any way help the courts to clean up their backlog of cases. All that it would do would be to decrease the caseload of the Federal Courts and correspondingly increase the caseload of the State Courts, which are far less able to carry the additional burden.

I trust that your Subcommittee can come up with some real solutions to the problems which face both the State and Federal Courts, Quentin, but not by merely shifting the load from the Federal to the State Courts. That, in my opinion, would be no solution at all.

I am sure you are fully aware of what such a bill would do to the State Courts of North Dakota, where the cost of operating the judicial system has already become very, very burdensome; and I trust that you will give this situation your very careful consideration.

With kindest personal regards, I am,

Very sincerely yours,

ALVIN C. STRUTZ.

SUPREME COURT OF FLORIDA,
Tallahassee, Fla., September 22, 1971.

HON. EDWARD J. GURNEY,
U.S. Senator, Senate Office Building,
Washington, D.C.

DEAR SENATOR GURNEY: Early in October I am informed a subcommittee of the Senate Judiciary Committee will consider Senate bill 1876, a bill designed to revise federal jurisdiction.

Much of the bill is highly desirable, but I have no sympathy at all with the proposal to reduce the diversity jurisdiction of the United States District Courts, thereby moving many thousands of cases to the already overburdened trial courts. I am enclosing a statistical report made by me on June 17th at the Annual Meeting of The Florida Bar on "The State of the Judiciary" which I hope your busy schedule will permit you to read. You will observe that last year Florida's 126 Circuit Judges disposed of 119,576 cases but the new filings were 133,145, thus the courts fell behind more than 13,000 cases. Our Courts of Record, composed of 52 Judges, disposed of 38,205 civil cases and 158,185 criminal and traffic court cases for a total of 196,390 cases, but again fell far behind.

I am attaching copy of a letter from Mr. John P. Frank to Chief Justice Kavanagh dated September 17, 1971, which states the case clearly and in which letter I concur.

Notwithstanding all the studies being made, the simple fact is the Courts of the United States are badly overloaded. It is true that many administrative reforms can be made and are being made. This Court, during the first six months of this year, disposed of the highest caseload in its entire history, and this was accomplished by the dedication of the Associate Justices and the employment of every new administrative technique which I could conceive.

I hope the Committee will give some thought to the following three simple suggestions:

- (1) Leave the diversity of jurisdiction statute just as it is.
- (2) Create about 250 new United States District judgeships of a roving nature, to be assigned by the Attorney General, for a term of six years but who would have the first claim on any vacancy occurring in their home district.
- (3) Make available to the state governments, with no strings attached, sufficient funds to increase their judicial power by one-third upon temporary judgeships being created in the state somewhat along the same lines as mentioned in recommendation two.

Some will say that you could not get capable lawyers to accept temporary judgeships. I disagree. The legal profession has historically met its challenges, and there will be many fine lawyers willing to accept as a public service and others who will accept with the idea that sometime during the temporary service, a permanent judgeship will open up.

Perhaps these suggestions are too simple, but I, frankly, believe they would come nearer doing the job than anything I have seen in any of the reports I have read.

Assuring you of my high esteem and with kindest personal regards and best wishes, I am

Very truly yours,

B. K. ROBERTS.

Enclosures.

RESOLUTION OF THE BOARD OF GOVERNORS OF THE STATE BAR OF ARIZONA

"RESOLVED: that in response to the request of the Ninth Circuit Conference, the Board of Governors of the State Bar of Arizona herewith approves and adopts as its own the Statement of its committee concerning diversity jurisdiction."

STATEMENT OF THE ARIZONA STATE BAR COMMITTEE

This Committee, composed of numerous lawyers representing the various branches of the practice and the various regions of the State of Arizona, opposes the American Law Institute proposal sharply to reduce the federal diversity jurisdiction.

We appreciate that there are numerous other purposes contained in the ALI recommendation; but the major purposes would, we believe, move something over 60% of the diversity cases into the state courts. Of such a plan, we altogether disapprove, and we briefly set forth our reasons:

1. Insofar as this plan relieves the federal courts of congestion, it does so at the expense of the state courts. We see no virtue in moving cases from one crowded docket to another; we believe that as a practical matter the plan would make what might in a typical instance be a two-year wait in a federal court to a three-year wait in a state court.

2. We find no reasons advanced by the ALI for the proposed change other than the general observation that somehow it is more compatible with federalism to take the cases off the district court dockets. In fact the diversity system has been with us since George Washington's day, and we are not impressed with any argument that a jurisdictional arrangement stemming so directly from the Constitution and the First Congress is "unfederal."

3. We do find instances of geographic prejudice, and we believe that our two court system definitely helps obtain justice where otherwise there might be regional prejudice and injustice.

4. Great new problems are opened by the ALI proposal. If adopted, it would make necessary determination of whole new controversies as to whether a case belonged in the state or federal court, which we believe would be time consuming, wasteful, and unrewarding.

5. We believe that the substantial elimination or drastic diminution of the diversity cases in the federal courts would leave in those courts only a federal specialty bar. This we consider regrettable. We find, as a matter of our prac-

tical experience, that the practice on both the federal and the state sides benefit from the free circulation of lawyers and ideas between the two. This Committee in particular has observed the passage of desirable procedural practices back and forth between state and federal courts. This is because the lawyers are in one court one day and the other the next. The proposal, by isolating the federal bar, would cause a substantial harm to both.

6. The existing system works well. Because of the expanding population of this booming area, we have had exceptionally severe docket problems in both court systems; as we have noted, the reduction of congestion on one side would not be improved by magnifying it on the other. Apart from this, the dual court system has been a good, working arrangement. The ALI proposal would destroy this, to no good end that we can see.

Respectfully submitted.

RICHARD C. BRINEX,

Chairman, Arizona State Bar Committee on Civil Procedure.

ARKANSAS REPORT OF SPECIAL COMMITTEE ON PROPOSED CHANGES IN FEDERAL DIVERSITY JURISDICTION

This committee was appointed by the President at the Planning Meeting of the Executive Committee at Pine Bluff in July, 1963.

The matter for study is Tentative Draft No. 1 of The American Law Institute entitled "Study of the Division of Jurisdiction Between State and Federal Courts." While the proposed changes deal with other topics of jurisdiction, the principal changes are in diversity jurisdiction and a committee elected to limit its study to the particular phase.

The proposals would add eight new sections to Title 28 of the United States Code to be numbered Sections 1301-1308, inclusive.

The Reporters have prefaced Tentative Draft No. 1 with certain questions regarding the changes, and the committee feels that its report can best be made by submitting its answer to these questions.

Question No. 2.—Are we right in prohibiting a person from bringing a diversity action in a district court of a State of which he is a citizen?

Answer.—We feel that this change in the law is wrong. One of the principal reasons for this change, as well as other changes in diversity jurisdiction, is to lessen the case load of the federal courts. While the committee recognizes the fact that federal court dockets are usually crowded, the same may be said of most of the state courts.

Through the courtesy of the clerks of the two district courts in Arkansas, the committee has obtained statistics of the number of cases filed during the period July 1, 1961, to July 1, 1963. Of 1,034 cases filed or removed during that period, 462 cases, or 45 percent, were diversity cases. Of these 256, or 25 percent, were original filings, and 206, or 20 percent, were removals. Information wasn't readily available as to how many original filings were by residents of the state; but, judging by the committee's experience, we feel it is a safe assumption that less than 50 percent would be in that category. Consequently, looking at the total case load, it would not appear that the original actions by residents in diversity cases is a substantial problem in this state.

On the other hand, there are practical considerations in retaining federal jurisdiction for resident plaintiffs in diversity cases. Local situations—political, economic, and otherwise—sometime make resort to a federal district court as a substantial aid to justice. The fact that federal court juries are drawn from the entire division composing, in most instances, a number of counties often is beneficial in the attainment of a fair and openminded jury.

For these and other reasons, the committee feels that it would be a mistake to deny federal diversity jurisdiction to residents.

Question No. 3.—Are we right in restricting a corporation "permanently established" in a State from access to the federal courts of that State in actions arising out of events in that State?

Answer.—The committee feels, for many of the reasons referred to above, that it would be wrong to restrict a corporation "permanently established" from access to the federal courts.

Aside from the practical considerations of local conditions mentioned above, because of the greatly increased commerce among the states and the widespread geographical activity of many corporations, the benefits resulting from a nationwide court system available to corporations in every state in which they may

operate facilitates the expansion and geographical location of corporate activities. This is a valuable right from a practical standpoint that should not be destroyed.

The committee wishes to acknowledge the assistance of Mr. Joe Barrett, a member of The American Law Institute, in furnishing materials for study and advice.

Respectfully submitted.

OLIVER CLEGG, *Chairman.*
MAURICE CATHEY.
WILLIAM S. ARNOLD.

RESOLUTION OF THE OREGON STATE BAR ASSOCIATION, MEDFORD, ORE.,
SEPTEMBER 28-OCTOBER 1, 1966

"The Committee recommends that the Oregon State Bar:

"1. Disapprove all of the proposals limiting federal jurisdiction, except the one providing that federal courts shall have no jurisdiction of civil actions arising under State Workmen's Compensation laws.

"2. Approve all of the proposals tending to increase federal jurisdiction, and approve the neutral proposals."

The Committee recommendation was adopted by the Oregon State Bar.

RESOLUTIONS OF THE UTAH STATE BAR

The Judicial Council of the Executive Committee of the Utah State Bar in October, 1971, adopted resolutions opposing the principal diversity provisions of Senate Bill 1876. The minutes of these meetings are not yet available.

STATEMENT OF JOHN P. FRANK

The principal statement of Mr. Frank reserved the right to supplement with additional attachments and authorizations as they might be received. He wishes to retain the same right since other jurisdictions will be heard from but would now note that he appears in behalf of the Committee for Diversity Jurisdiction and also by independent authorization from the Presidents of the State Bars of Arizona, Hawaii, Oregon and Washington. Resolutions and letters presented by Mr. Frank are as follows:

1. Letter from the Honorable Richard H. Chambers, Chief Judge of the Ninth Circuit Court of Appeals, attached to main statement.

2. Letter of the Honorable Alvin C. Strutz, Chief Justice of North Dakota, attached to main statement.

3. Letter of the Honorable B. K. Roberts, Chief Justice of Florida, attached to main statement.

4. Letter of the Honorable Thomas M. Kavanagh, Chief Justice of Michigan, attached to this statement.

5. Resolution of Arizona State Bar attached to main statement; authorized to be presented by President Howard Karman, Arizona State Bar, October, 1971.

6. Resolution of Oregon State Bar attached to main statement; authorized to be presented by President John Schwabe, Oregon State Bar, October, 1971.

7. Resolution of Arkansas State Bar, attached to main statement; authorized to be verified September 30, 1971, by Mr. Joe C. Barrett, Jonesboro, Arkansas; letter attached to this statement.

8. Letter statement of position of Hawaii State Bar, copy attached to this statement; authorized to be presented by Mr. Leslie Lum, present president of Hawaii State Bar, October, 1971.

9. Report of the Washington State Bar, copy attached to this statement; authorized to be presented by Mr. Fred Velikanje, present president of the Washington State Bar, October, 1971.

LAW OFFICES OF BARRETT, WHEATLEY, SMITH & DEACON,
Jonesboro, Ark., September 30, 1971.

Mr. JOHN P. FRANK,
Phoenix, Ariz.

DEAR JOHN: Late in 1963 a study committee of the Arkansas Bar Association examined Professor Fields' proposal for restricting diversity jurisdiction of the United States District Courts. Attached is a copy of the resolution prepared at

that time. Both Mr. Cathey and Mr. Arnold are past presidents of the Arkansas Bar Association.

You will recall that I personally opposed the proposal on the floor of the American Law Institute as did you. Our views did not prevail, but the vote from the floor was relatively close. I am still opposed to restricting diversity jurisdiction. Statistics I have seen with respect to congestion in the United States District Courts were largely from metropolitan areas where congestion in the state courts was equal to, if not greater than in the federal courts.

My office handles a large volume of trial work in both state and federal courts and I see no objection to the United States furnishing a forum within which a client's case can be litigated.

With personal regards, I am,

Sincerely yours,

JOE C. BARRETT.

BAR ASSOCIATION OF HAWAII,

Honolulu, Hawaii, May 13, 1966.

Re Proposed legislation to curtail District Court jurisdiction in diversity of citizenship cases.

JOHN E. SIMPSON,

*Chairman, Committee on Federal Rules of Civil Procedure,
Los Angeles, Calif.*

DEAR MR. SIMPSON: Earlier this year Judge C. Nils Tavares called the attention of the Bar Association of Hawaii to the proposed legislation recommended by the American Law Institute which would have the effect of further restricting the jurisdiction of the United States District Court in cases where jurisdiction is based upon diversity of citizenship.

The question as to the desirability of such legislation was referred to the standing committee on Judicial Administration of the Bar Association. After a study of the proposals the committee reported to the Executive Committee of the Bar Association recommending that the Bar Association of Hawaii go on record as opposing this proposed legislation. The recommendation of the committee was adopted by the governing body of the Bar Association, the Executive Committee.

I have been directed by the Executive Committee to report the position of the Bar Association of Hawaii to the chairman and each member of the Committee on Federal Rules of Civil Procedure, Judicial Conference Ninth Circuit.

It was the sense of the standing committee, concurred in by the Executive Committee, that there was no compelling reason for this rather drastic change of a long established policy in the federal law and that the reasoning behind the proposed change was primarily to alleviate congestion in certain district courts, notably those in the more populous areas of the eastern United States, without regard to whether or not state courts in that area, many of whose calendars are already overcrowded, could under the circumstances provide adequate relief for litigants. Essentially the proposed amendments would appear to be for the convenience of a limited number of federal courts and do not in our opinion reflect the best interests of the public in maintaining a strong federal judiciary.

The Bar agrees with the position taken by Professor Moore in his address of May 8, 1964 to the Sixth Circuit Judicial Conference (published in 35 FRD, p. 305) to the effect that the correct way to alleviate congestion in the district courts was not to cut down in judiciary but to appoint an adequate number of district judges to handle the case load.

While in theory there may be some justification for urging the proposed amendments, it was the opinion of those members of our Bar who actually engaged in practice before the courts of this state and of the United States District Court of Hawaii that we could not agree with the assumption of the theorists to the effect that the reasons for the creation of the diversity jurisdiction by the first Judiciary Act of 1789 have ceased to exist throughout the United States.

Aside from the general reasons and on a purely local basis it was felt that such changes would be undesirable. Hawaii has for many years had a large and transient Service population, many of whom would possibly be deprived of their rights to seek redress in or remove a case to the Federal courts were the proposed amendments to be adopted.

On behalf of the Bar Association of Hawaii I request that its position on this matter be given consideration by the committee of which you are a member.

Very truly yours,

WILLIAM L. FLEMING, *President.*

SUPREME COURT.

Lansing, Mich., September 27, 1971.

Hon. PHILIP A. HART,
U.S. Senator,
Senate Office Building,
Washington, D.C.

DEAR SENATOR HART: I have watched and encouraged, with more than a passing interest, the growing developments in the area of judicial federal-state relationships. Our Federal-State Judicial Council, as suggested by Mr. Chief Justice Burger at the St. Louis American Bar Association convention, has been established and has produced fruitful initial results. Likewise, the Federal-State Relations Section presented at the 1971 Annual State Judicial Conference by your Judge Murrah of the Judicial Administration Center and Judge Griffin Bell of the 5th Circuit, generated much interest, controversy and tangible proposals.

Of particular interest, and the specific purpose of this letter, is the ALI's study of the division of jurisdiction between state and federal courts. I am pleased to note that their labors have, to some measure, contributed to Senate Bill 1876, which is now before you as a member of the subcommittee on improvements in judicial machinery.

I will not attempt to present or even discuss the pros and cons of S 1876 as it affects the practice and procedure in the federal courts as well as in the state courts. That is best left to the experts who will be appearing before your subcommittee. I would, however, like to express some views as the judicial administrator of the courts of our state. I shall restrict my comments to two areas: federal question jurisdiction and diversity jurisdiction.

A. FEDERAL QUESTION

The elimination of the jurisdictional amount in cases involving a federal question is a wholesome and realistic refutation of a legal fallacy. Briefly put, federal questions belong in federal courts. A \$10,000 federal question is no more meritorious than a \$1.00 federal question.

Likewise, the provisions of § 1304 permitting a defendant with a federal question defense to remove from the state court to the federal court is heartily applauded by both our trial and appellate benches. Not too long ago our Court in *Arber v. The Evening News Association and Stahlin, et al.* (1969), 382 Mich 300, had to apply the *New York Times v. Sullivan* doctrine. As my law clerk can attest, it was a laborious job of researching, digesting and analysis of the federal court opinions to reach the rule which we "believed" they would apply. Certiorari was denied by the United States Supreme Court. However, the case could have been more expeditiously decided by the lower federal court and more directly reviewed by the United States Supreme Court. The proposed § 1304 hopefully will effect this efficiency and direct review.

Further, I fully endorse § 1372(e) which permits certification of questions of state law by the federal court to our Supreme Court, provided the state court establishes the appropriate rule and certification will not cause delay. I am confident that your federal District Court judges will express their perplexity when compelled to decide a question of state law in a precedential vacuum. From the state's point of view, it is equally disconcerting. The federal District Court judge "creates" common law which is then pressed upon our trial and appellate courts by the diligent attorney as controlling. This, of course, inverts *Eric v. Tompkins*. This puts the federal "cart" before the state "horse." Nevertheless, due respect must be and often is accorded the District Court decision. The ready solution is to secure the state court's holding.

Our Court will soon consider the National Conference on Uniform State Law rule on Uniform Certification of Questions of Law which was approved by the ABA on August 8, 1967. With some modification and eventual adoption, Michigan would have a rule contemplated by S 1876, § 1371(e).

B. FEDERAL DIVERSITY JURISDICTION

I have been informed that the adoption of the ALI proposals on diversity could effect an increase in state court litigation by approximately 17,000 cases, which would under the present code be taken in the federal courts. We have no concrete estimates of the number of cases which would now be pressed in our state trial

courts. However, the impact is clear. Our trial judges regard the prospect of more and more, otherwise federal, cases being dumped on their laps with much trepidation and discouragement.

We have accomplished much in the way of local court reform and of expediting settlements and trials. This proposal, if adopted in toto, stands to offset our progress to date and impair our capabilities in maintaining a relatively uncongested docket.

I would suggest moderation. I believe that if the diversity proposals are to be enacted into law, such enactment should be limited to the major proposals, e.g., individuals, administrators, corporations, etc., and should not extend to the miscellaneous provisions such as the "commuter" provision. We are peculiarly sensitive to this problem. Michigan, because of its proximity to Canada, Indiana and Ohio, and because of its industrial base, has many commuters. Other miscellaneous "frills," which are better known to your subcommittee, might well be eliminated with little impairment to the entire proposed bill.

My views, and hopefully some of my suggestions, will be more fully presented by those appearing before you in the near future. I am confident that they will receive your usual careful and thoughtful consideration.

Sincerely yours,

THOMAS M. KAVANAGH, *Chief Justice.*

REPORT OF THE WASHINGTON STATE BAR ASSOCIATION'S ADVISORY COMMITTEE ON
FEDERAL RULES OF CIVIL AND CRIMINAL PROCEDURE AND FEDERAL RULES OF
EVIDENCE

Re: The American Law Institute's proposal to sharply reduce the Federal jurisdiction in diversity cases.

The American Law Institute was requested by the Chief Justice of the United States Supreme Court to undertake a comprehensive study of the division of jurisdiction by the state and Federal courts due to the growth of the Federal judicial system over the years and its prospective future growth; if its growth and work load continue. The A.L.I. accepted the invitation and studied the problem for a number of years.

As a result of these studies, it has produced "Proposed Final Draft No. 1" dated April 19, 1965. This draft deals primarily with curtailment of general diversity jurisdiction, multi-party and multi-state diversity jurisdiction.

As part of the work of this committee, we have examined the draft of the A.L.I. and the Report of the Committee on Federal Rules of Civil Procedure for the Judicial Conference of the Ninth Circuit for its meeting at Newport Beach, California, July, 1966. In addition, your committee has discussed the draft with various members of the Washington State Bar Association.

The proposed final draft of the A.L.I. covers subjects other than the curtailment of general diversity jurisdiction. Your committee makes no recommendations on these other subjects and believes this should be the subject of a further study and report. However, the question of curtailment of general diversity jurisdiction is of paramount importance and upon this subject your committee recommends that the association make its position known.

The A.L.I. proposes certain changes to 28 U.S.C. 1332, the diversity statute. These are referred to as Nos. 1301 and 1302 in the draft of the A.L.I. Section 1301, while generally following the subject of 28 U.S.C. 1332, proposes certain subsections as to the residence of corporations and partnerships for the purpose of diversity. Your committee is not prepared to discuss these at this time.

Proposed section 1302, however, is entirely new. It provides in effect that a citizen of a state could not bring an action against a non-resident citizen in the Federal District Court in the state in which the plaintiff resides. This section would also prohibit a corporation which resides in the state, or has its principal place of business in the state, or has maintained a local establishment in the state for two years, from bringing an action in the Federal District Court. In substance the proposal deprives a plaintiff of the right to bring his action in the Federal District Court on the grounds of diversity.

The effect of such proposal would be to exclude from the diversity jurisdiction of the Federal courts cases of which such courts have had jurisdiction since Congress enacted the first Judiciary Act of 1789. It is estimated that the proposed section 1302 would exclude from Federal courts between fifty-five and sixty percent of Federal diversity jurisdiction cases.

It is the opinion of your committee that the proposal of the A.L.I. which involves this curtailment of diversity jurisdiction, should not be adopted for the following reasons:

(1) It has not been shown that jurisdictional diversity is the major cause of the increase in the work load of the Federal District Courts. The increase in population, business activities and change in economic conditions are more likely the cause of congestion in the work load in the Federal District Courts, particularly in the metropolitan areas. While the proposal may relieve the Federal courts of congestion, it does so at the expense of the state courts, and the litigants suffer. The problem of court congestion in our state courts is a paramount one. This proposal would only add to the problem.

(2) The substantial elimination or drastic diminution of diversity cases in the Federal courts would leave in those courts only a Federal specialty bar. The practice on both the Federal and state sides benefit from the free circulation of lawyers between the two—particularly in the development of procedural matters.

(3) Eliminating diversity jurisdiction could result in the Federal courts becoming specialty courts dealing primarily with Federal questions. It would limit the experience of the Federal District Judges with state law and procedure, which is so essential to the whole development of the Federal judiciary. Such curtailment of jurisdiction would tend to set the Federal courts apart from the general bar.

(4) Local and regional prejudices do exist, and your committee believes that our two court system helps obtain justice where otherwise there might be regional prejudice.

Your committee joins with the other committees who have reported on this subject and recommends that the Washington State Bar Association adopt a position against the proposed curtailment of diversity jurisdiction as set forth in the proposed final draft of the American Law Institute.

Respectfully submitted.

CHARLES H. PAUL.

CHARLES W. BILLINGHURST.

SAM L. LEVINSON,

Chairman.

Senator BURDICK. You refer to the 13,000 or the 14,000 cases. As a matter of fact, very few of them are tried. Do you know what percentage of the 14,000 actually go to trial?

Mr. FRANK. Senator, I would like, if I may, to try and figure that out from the administrative report, and it may be that your staff knows. But it may be that Mr. Mullen has those figures.

Senator BURDICK. Eighty-three percent are settled.

Mr. FRANK. I would assume a vast number are settled, sure.

All of that, by the way, takes a certain amount of court time, court leadership, and if they intend to get settled after pretrial and jockeying around—

Senator BURDICK. But it does not engage the judges completely.

Mr. FRANK. Your Honor, I think you will find some involvement, but I agree that it is not as much of an involvement as it would be if all of them had to be tried, of course.

Senator BURDICK. And then in your equations, you have overlooked the fact that quite a few cases in the Federal question can be shifted back to Federal courts.

Mr. FRANK. I do not know myself, Senator, what that quantity would be. I have never seen a statistical table, and on that score I simply have to plead ignorance. If the staff has one, I have not seen it.

Senator BURDICK. So, when you consider that 84 or 85 percent of the cases are not tried, and then there is a shift of some cases back into the Federal courts, the pile is not very big, and the testimony so far would indicate that it would be about 1 to 2 percent.

Mr. FRANK. Senator, the fact remains that at the present time the same thing is true in the State courts. A high proportion, of course, are settled. The fact still remains that the dockets are running a year to—as I have shown you here, a year to a year plus a few months on the Federal side, and 3, 4, and 5 years on the State side; so that, without any doubt at all, we are going to make the one an awfully lot worse.

Senator BURDICK. It is my understanding, Mr. Frank, that the basis for this legislation on the diversity portion of it is not based upon congestion one way or the other. It is based on what they thought would be a logical division or separation of the work, because if it were congestion, then, what we ought to do is find some way to shift more cases to the Federal courts so they are more even.

Mr. FRANK. I would be glad to come in with a proposal to that effect, Senator, if you would like.

Well, I might say on that latter point, the most familiar phrase there is in the history of law to both of us is an observation of Holmes that the life of the law is not logic, it is experience, and thus he begins that great book on the common law. I do not, personally, happen to think that the ALI diversity plan is "more logical." but whether it is or not, the judgment for this committee to make is the judgment based on experience: Has the system been working? Will it be improved or will it not be improved? And what is our experience with it? And there I direct myself to the fact that the experience with diversity has really been satisfactory in the last 30-some years.

Senator BURDICK. You think it has been working well?

Mr. FRANK. It has been working well, and, I repeat, I think you will find the bar simply overwhelming on that point of view. This is not just conventionalism in the customary conservatism of my trade. It is because of the opinion of others who are involved who want to keep it exactly as you spoke of the other day when you opened these hearings, they wanting to hold their option. And it is a useful option to have; it helps.

Senator BURDICK. Well, if it is working well then, why do you want to give the in-State plaintiff the greater option than the in-State defendant?

Mr. FRANK. Your Honor, had it been up to me, as an original proposition, I would have thought the in-State defendant should have been able to remove, too. But my inclination is to take it as we find it. All I know is that right now this is the going system, and, in fact, to reasonable satisfaction, is disposing of something in the order, overall, of 87,000 cases a year.

Senator BURDICK. I do not see how you can, in fairness and equity, say that it is fair to give the one the right for removal and not the other.

Mr. FRANK. In the first place, I repeat, Senator, if you wanted to come in with a bill to alter that removal provision so that he could do that, it would make a lot more sense. I would be all for it.

But the point I was making is the one that my good friend and leader, Bill Moore, made yesterday, the fact that you may not be solving all of the problems of the world is no reason for not solving some of them.

Let us take school lunch, if you do not mind, because that reduces it to the bread-and-butter level. Because the school lunch program is

not universal is no reason for abolishing the school lunch program. The fact that this system serves a portion of the need is certainly a reason for expanding it and certainly no reason for wiping it out.

Senator BURDICK. I do not think that is a parallel at all. You are saying to the defendant that your suit is brought in your own bailiwick and backyard and you cannot transfer. Why cannot you make the same argument for the plaintiff who brings the suit in his own backyard?

I cannot see the difference.

Mr. FRANK. My answer is that I would reverse it, and I would say that if it were up to me I would let the defendant make the transfer, but I would also say—and this is what I hope will appeal to you—that we have, in fact, now got a practical working system. It is functioning reasonably well in this respect, and I would not alter it because of some theoretical concerns which might have bothered the Congress 100 years ago but, in fact, did not. This is what we inherit. It is, in fact, operating pretty well.

Senator BURDICK. This is not theoretical. This is giving one litigant an advantage over the other litigant.

Mr. FRANK. But, Senator, I repeat—and I have only two answers, and I cannot say more—if you want to sponsor a bill to broaden the diversity to let that case be removed, then I would be glad to appear here in support of it. Second, I cannot escape looking at it as a going problem with a going, existing solution in the fact that we have worked out a pretty fair system on the affirmative side, and there is not, I repeat, from experience, experience, experience any reason for abolishing it.

Senator BURDICK. I have a few more questions, and I believe the staff has additional questions. So, we will go over these rather hurriedly, if we can.

Mr. FRANK. Fine. Thank you.

Senator BURDICK. Mr. Frank, in your testimony, you acknowledged that the fear of prejudice against outsiders—not actual prejudice—was one of the primary bases for creating diversity jurisdiction—on page 7 of your testimony.

Mr. FRANK. That is correct.

Senator BURDICK. If that is so, then why should resident plaintiffs have the option of invoking diversity jurisdiction?

Mr. FRANK. First, I would like to say, without expanding it because I want to make room for others, I am not at all sure that that prejudice ever existed. I wrote a long piece on this one time, and it may have been theoretical from the beginning. But what you are asking now is essentially the question: Why the plaintiff and not the defendant? And that brings me back to the answer already given. As far as I am concerned, I believe the privilege should go to the defendant, and, in the second place, I repeat, that judgment, if erroneous, was made 150 years ago, and we have lived with it since, and it has worked out pretty well.

Senator BURDICK. On page 10 of your testimony you make the remark that where political considerations make Federal judges poor, they are likely to make local judges even worse. Are you suggesting that for the most part Federal judges are superior to State judges?

Mr. FRANK. I am suggesting this not in most part but rather in particular instances there may be enough superiority either in the judge one is likely to get or in the procedure in general and general

efficiency and smoothness of the operation which is an advantage, which is helpful. In my own State, for example, we have 25 trial judges in the State court in Phoenix, Ariz., and three in the Federal court, and an overall generalization would be impossible. I would be just as happy to be before Judge McCarthy in my State as I would be before the Honorable Judges of the Federal Court, for example. But these are all factors the lawyer takes into account, the nature of the case, the practical problems of a judgment, as to the rapidity with which it will move, and all the other factors.

Senator BURDICK. Well, this trend of superiority seems to be running through the hearings, and the general feeling is there is superior justice in the Federal courts.

Mr. FRANK. I think it is commonly true that there are great advantages and that we want, therefore, to be able to use them. Let us take, if you do not mind, the grubby matter of pay. You can get, because you are paying more, a better judge or better people to serve as Federal district judges than we have been able to get in our State court where we pay less. I might say that we hope to change this, and it may have been in the last few days that the amount to pay was raised, and that will help. But this, again, gets to be a practical problem which exists.

Senator BURDICK. In 1938, we established the Federal Rules of Civil Procedure, the new rules.

Mr. FRANK. Right.

Senator BURDICK. Thirty-three years have now elapsed and only 40 percent of the States, about 40 percent, still retain the old procedures. You said that you thought that uniform procedure was not far away. Well, when you have that lapse of time and only that many States adopting the uniform practice, it does not look like it is too close—that uniformity is too close.

Mr. FRANK. If I may, respectfully, Senator, take the opposite point of view to that. As you know, we do tend to move gradually. The fact that we are that high already, I think, shows the remarkable degree of progression, and beyond that the figure you have given there is of those who have adopted essentially this system in toto. I think you will find—and Professor Moore knows this better than I, but I think you will find that a very large number have adopted appreciable parts, if not the whole. I do not know about North Dakota, and you doubtless could tell me.

Senator BURDICK. Oh, we are one of the leading States. We move fast.

Mr. FRANK. Well, I will bet you will find, Senator, to the extent that you are moving fast is because you have got lawyers operating in both court systems, and that really makes a lot of difference.

Senator BURDICK. When you talk about a Federal bar and a State bar, that is all strange to me, because we only have one bar. We cannot afford the luxury of having several bars.

Mr. FRANK. Senator, please, let me make that point as urgently as I know how, that the reason you have one bar is because you have a diversity practice. If you had in the Federal courts only the tax cases and the Federal specialists, you would not have this flow back and forth. We have only one bar, too. My firm has some 40 lawyers in Phoenix, Ariz., and our people, because we have diversity cases as well as State cases, are equally in both bars and both courthouses, be-

cause the procedure is identical and it functions simply as an exchangeable thing, and it really is true, not just loose talk, that the ideas move back and forth.

Senator BURDICK. In my State, we meet for lunch regardless of whether this is diversity or no diversity.

Mr. FRANK. I would love to come to lunch sometime, and I will see you there sooner or later.

Senator BURDICK. You are aware, of course, that a substantial number of diversity cases will remain in the Federal courts even if 1876 were enacted in the present form. In many of the State courts the cost of discovery studies could not be borne by the State, yet such studies would continue to be made by the Federal courts even if 1876 were enacted. Now, Mr. Frank, isn't the primary thrust of procedural reform communication as to new procedural methods? For example, the procedural reform adopted from the States which you spoke of, the rule on "process" which came from Illinois and the "joinder of parties" coming from Michigan—these were adopted, or are being considered for adoption, even though only the practitioners in Illinois or Michigan have had actual experience with them.

Now, it is knowledge of the value and simplicity of these State rules written in the various legal journals and bar publications, not actual experience, which is providing a major impetus in their adoption in the Federal court and the States, is it not?

Mr. FRANK. I think I am not categorically sure I have got the full thrust of the question, Senator. But, again, it relates to that lunch in North Dakota. What we are saying is that ideas move back and forth, because people have common experience and because they share in them on that basis, and because, therefore, ideas can be done with the superior Federal staffing and resources which are reasonably close to the State ideas. If I may be precise and concrete and brief, what happens is that when a Federal rule has been in circulation, or some proposal, something which is Federal, we have had State bar meetings, and this is true around the country, and they can talk about these things, talk it over—how has it worked in the Federal courts and how has it worked in the State courts—and there is a real slow and honest exchange and debate and votes, and all of the rest, and this is a product of having between the two a large body of common litigation.

Senator BURDICK. Well, the point you want to make, Mr. Frank, is it not only experience as you have testified to but it is the various writings in the law review journals and the other publications that have come to the knowledge of lawyers that help pave the way for changes in the procedures and everything else. And so it is not all experience. There are a lot of scholarly works that go on and that go into it.

Mr. FRANK. Oh, I would stipulate—and, of course, we lawyers will still talk to each other. But the fact remains, Senator, as you know and as I know, as practitioners, this comes through your courts because you get a feel of it, because you did it, because we learn a motion for summary judgment, we learn whether we want to waive under rule 12 or we do not. We are living with it, and that has the real effect on our thinking.

Senator BURDICK. Do you approve the provision which will allow the claims of the family to be tied together when one member has met

the \$10,000 jurisdictional limit when all of the claims arise out of the same occurrence?

Mr. FRANK. I believe so, but I am not decisive. In preparation for today, I gave prime attention to 1302(a) and 1302(b), and I really have not rethought that one since I voted on it at the Institute.

Senator BURDICK. Are you in agreement with 1304(b) which would allow removal by a single defendant even when there is not complete diversity?

Mr. FRANK. On that score, again, I really do not have today a meditative view on it, and, if I may, I will supplement by letter, but I cannot do better with it right now.

Senator BURDICK. I know diversity is the main area we are exploring in these hearings the last week or two, but I might just ask you off the cuff: Have you gone into the Federal question section at all?

Mr. FRANK. I went through it, as an Institute member, and supported all of it on the floor of the Institute.

Senator BURDICK. And you support, I suppose, to carry it a little bit further—or are you in agreement with their position under the three-court situation?

Mr. FRANK. On the three-judge court?

Senator BURDICK. The three-judge court.

Mr. FRANK. Yes. This is becoming an unburdenable abuse that we have just got to do something about. We have reached the gimmick stage where any ingenious fellow can just shove stuff into a three-judge court in order to get a direct appeal to the Supreme Court, and we should not be allowed to do that. I have got one of them right now.

Senator BURDICK. I happened to be over at the Supreme Court yesterday, and they have got a terrific workload over there, too, and part of it comes from the three-judge court situation.

Well, without binding you to every word, your reservations then go to the diversity question?

Mr. FRANK. Yes. I have supported all of this except for 1302 (a) and (b). I am aware that the importance of it, no matter how you slice it, is that 13,000 or 14,000 filings are going to be moved, whether you settle them or not or what you do with them.

Let me put it this way, Senator: This is quantitatively, far and away, the biggest piece of legislation in the history of the American judiciary. The basic act was the act of 1789 and the act of 1875, and now there is proposed this one. This particular provision, (a) and (b), quantitatively is, I suppose, by five times, 10 times, enormously, the largest quantitative thing that has ever been presented. I think I am back to this, Senator, that the bar will tell you, the judges will tell you, they will all tell you, that there is just not any good reason on earth for moving these cases from one shelf to another shelf. It is just mumble-jumble.

Senator BURDICK. All right.

Mr. Westphal?

Mr. WESTPHAL. Mr. Frank, you have mentioned here in your testimony your opinion that the ALI proposal is a reflection of the Frankfurter point of view as represented primarily in the Harvard and Columbia Law Schools.

Mr. FRANK. Yes; for which I have the greatest respect.

Mr. WESTPHAL. We were told here by Professor Field that Justice Frankfurter's opinion on diversity was that the diversity jurisdiction should be completely abolished.

Mr. FRANK. That is right.

Mr. WESTPHAL. Is that your recollection of what his views were?

Mr. FRANK. I think that is about right, and his followers have come about as close to it as it is possible to get.

Mr. WESTPHAL. Now, this ALI study does not urge the complete abolition of diversity jurisdiction, does it?

Mr. FRANK. No. It only eliminates about two-thirds to three-quarters of it.

Mr. WESTPHAL. Well, we will get to your percentages later, but the fact of the matter is, according to the ALI estimate based upon the statistics that were then available from the Administrative Office of the Courts, that the maximum percentage that would be shifted would be about 59 percent of the diversity cases.

Mr. FRANK. May I respond to that?

Mr. WESTPHAL. Is that your recollection of what the figures were that they used?

Mr. FRANK. What I wish to quarrel with, Mr. Westphal, is merely the word "originally." The fact is, when this was being presented in the ALI, they did not have any statistics at all, and until I went out personally and started counting in various parts of the country, there were not any. These were created after the event, and when the initial determination had already been made.

Mr. WESTPHAL. Right; but by the time 1965 came, the 1964 figures from the Administrative Office were available, and those 1964 figures were discussed at the 1965 meeting of the ALI, were they not?

Mr. FRANK. With absolute precision, I cannot remember it that well. I will take your word for it.

Mr. WESTPHAL. In any event, you were present at the meetings of the ALI, the annual meetings of 1964 and 1965, when rather vigorous debate was had by the members of the Institute on this not-official-but-tentative draft of the diversity provision?

Mr. FRANK. I have participated in every debate there has been on this subject.

Mr. WESTPHAL. Do you recall that at one of those meetings that the so-called plaintiff bar represented by the American Trial Lawyers Association was given the privilege of the floor and was allowed to state their views on the diversity recommendations being considered by the ALI?

Mr. FRANK. I do.

Mr. WESTPHAL. And they took advantage of that extension of the floor privileges, even though their representatives were not members of the Institute, and they presented their views to the members of the Institute who assembled there for that annual meeting?

Mr. FRANK. I recall something of the sort.

Mr. WESTPHAL. All right. Now, in your work in behalf of this Committee for Diversity Jurisdiction, I take it that you have undertaken to contact a number of chief justices from various States?

Mr. FRANK. That is not—could I be more precise about that?

Mr. WESTPHAL. Yes.

Mr. FRANK. What we have done, simply because this matter is before this committee, is get in touch with people from the States of the seven

members of this committee. We have not done any more than that. You have heard from at least five of them, and I suspect you will from all seven.

Mr. WESTPHAL. So, your effort on behalf of the Committee for the Retention of Diversity Jurisdiction has been to contact chief justices from the same States from which the members of the subcommittee came?

Mr. FRANK. Well, and also in the Arkansas case, it has been bar groups, one or another.

Mr. WESTPHAL. I am not talking now about bar groups. I am talking about chief justices of the States' supreme courts.

Mr. FRANK. That is right, and I have not, personally, talked to any chief justice who is not one of the ones from this committee.

Mr. WESTPHAL. I believe that, as you have undertaken your work on behalf of the Committee for Diversity Jurisdiction, you were aware of the fact that the chairman of the subcommittee, in introducing this bill, stated in his introductory statement an important concern of the committee would be the impact this legislation would have on particular States?

Were you aware of that fact?

Mr. FRANK. Yes.

Mr. WESTPHAL. All right. And I think that the members of the committee staff advised you that copies of the bill were sent to everyone of the 50 State chief justices shortly after introduction?

Mr. FRANK. I am sure that they were, and you have certainly told me so. You have done a very good job.

Mr. WESTPHAL. And I believe the committee staff also told you that copies of the bill were also sent to everyone of the 50 State bar associations?

Mr. FRANK. You have so advised me.

Mr. WESTPHAL. All right.

And I think you were also advised that the committee was going to make an effort to determine on the basis of the statistics made available by the administrative office of the court just what the impact was going to be on each particular State, as far as the number of cases—whatever the number is that we are using—that would be shifted to that particular State?

Mr. FRANK. Not only is this true, but you have given me the figures which you have used. That is where I got them.

Mr. WESTPHAL. Well, these figures, as you know, became available in August, and on your next visit here we provided you with copies of those figures, and you have interpolated them and presented them in the supplement to your original statement.

Mr. FRANK. Yes. I would like, if I may, to clarify that. You gave me the figure for the 3 different years, and for ease of reading, because they made such congested type, I took only the last year, and then I totaled up three of the columns so that in that exhibit, columns 1 through 5 are yours, column 6 is mine.

Mr. WESTPHAL. All right.

Now, when you made the contact with the seven chief justices who are from the same States as the members of this subcommittee, did you have available to you the figures that had been furnished to you from

the subcommittee staff showing what the impact was on each one of the particular States?

Mr. FRANK. I did not.

Mr. WESTPHAL. All right. In the contacts you made with chief justices, did you in contacting them discuss with them either verbally or in letters, if that was your contact, this matter which you have expressed some concern about here, which is the dumping of large numbers of Federal cases upon the State courts?

Mr. FRANK. I am sure that I would have. Let me explain that the chief justice of my own State wrote a number of chief justices so that he was the one who, in fact—

Mr. WESTPHAL. So I take it the chief justice of your State did not have available any figures that showed the exact number of cases that would be shifted to any particular State?

Mr. FRANK. No. Prior to your good staff work, there were not really very reliable ones.

Mr. WESTPHAL. But, in any event, in the contacts that you made, did you in your contacts express to these seven chief justices your opinion that some 17,000 to 20,000 cases would be shifted to the State courts from the Federal courts?

Mr. FRANK. I cannot recall about the 20, but I, without doubt, in a letter I sent to Chief Justice Kavanagh used the figure 17, and I now think that is erroneous and that 14 is what I would now regard the correct figure or, approximately so.

Mr. WESTPHAL. Now, you do not deny that you might have used the figure 20,000 in your letter to Justice Kavanagh?

Mr. FRANK. Mr. Westphal, I assume you have a copy, but I do not, and I would be grateful if you would refresh my recollection.

Mr. WESTPHAL. All right, I will refresh your recollection, and I am quoting now from your letter of September 17 to Justice Kavanagh of "official estimates of the ALI on the number of cases that would otherwise be in the Federal courts is in the order of 17,000 cases" and you refer him to the figures at page 467 of the study.

(The letter to Judge Kavanagh follows:)

LEWIS & ROCA LAWYERS,
Phoenix, Ariz., September 17, 1971.

HON. THOMAS M. KAVANAGH,
The Supreme Court of Michigan,
Lansing, Mich.

DEAR MR. CHIEF JUSTICE: Thank you for your willingness to help. Senate Bill 1876, the ALI proposal for the revision of federal jurisdiction, comes on for hearing before that subcommittee of the Senate Judiciary Committee named the Subcommittee on Improvements in Judicial Machinery. This is a subcommittee of seven Senators, chaired by Senator Burdick of North Dakota. Senator Hart of Michigan is a member.

The entire proposal for revision is the biggest contemplated revision of the federal jurisdiction since 1875. It is contained in the book called *Study of the Division of Jurisdiction Between State and Federal Courts*, published by the American Law Institute in 1969. It has many many fine provisions, and my own opposition to it is restricted to the proposals radically to restrict the diversity jurisdiction. (In making section references, I am referring to the ALI numbers rather than to the bill numbers because I assume you are more likely to have the ALI draft at hand.) Section 1302(a) ousts from the diversity jurisdiction any claimant who is a resident of a state in which he sues or would remove, regardless of the citizenship of the other party. Section 1302(b) knocks out of diversity any corporation which maintains a local establishment in a state in which it

might otherwise invoke diversity, thus excluding all national corporations from this jurisdiction.

The official estimate of the ALI of the number of cases which would otherwise be in the federal courts is on the order of 17,000 cases; see the figures at pages 466-67. I personally find these figures confusing as given in that source, but I have done some field studies of my own. I note the figures in the *Report of the Director of the Administrative Office of the United States Courts* most recently published, showing about 14,000 contract and real property cases and about 15,000 tort cases, all of which can reasonably be attributed to diversity. In my judgment, the practical effect of the statute would be to move between 15,000 and 20,000 of those cases over to the state courts.

I have developed my point of view in depth on this subject in 73 *Yale L. J.* (1963) and in 17 *S.C. L. Rev.* 677 (1965), and won't burden you with the details here. Rather, let me reduce it to a sentence: There is no apparent profit in moving cases from one logjam to another. If we can reduce the total volume of cases in all courts, fine. Otherwise, it smacks of the old three-shell game if we do no more than put a pea under one shell and then, by some magic, make it pop up under another.

You have undertaken to write to Senator Hart to express your thoughts in opposition to this proposal. You might mention to him, if you care to, that Professor J. W. Moore of Yale, the author of *Moore's Federal Practice*, will be leading the opposition on October 5, and I on October 6, and either one of us would appreciate the chance of visiting with the Senator while we are in Washington should he have time. I would appreciate it if, as we had planned, you would send me a copy of your letter to Senator Hart so that I may put it into the record when I appear, as representative of a state point of view.

One further request: If you could give me the name of your State Bar President, I would like to take this same matter up with him.

Meanwhile, thank you for your help.

Yours very truly,

JOHN P. FRANK.

Mr. FRANK. If so, then I would like to correct it. I do not remember, but that would be plain error and it would be somewhat smaller than that.

Mr. WESTPHAL. You concede, then, that the figures that you referred to the Justice do not deal with 17,000 as the figure, but deal with 11,000 and 12,000 figures for 1964 as the maximum?

Mr. FRANK. Mr. Westphal, I have had just hopeless trouble, personally, interpreting that two or three pages of the ALI study and that is why I was so glad to get your figures there. I do not know how to add them up.

Mr. WESTPHAL. But, in any event, notwithstanding the fact you have trouble in trying to add up the figures and understand them as presented by the ALI in its study, in your letter of September 17, 1971, to Justice Kavanagh, you told him that in your judgment the practical effect of the statute would be to move between 15,000 and 20,000 of those cases over to the State courts.

Mr. FRANK. Yes; that was my then view, but I think now in the light of your figures that 14,000 would be a better figure.

Mr. WESTPHAL. And in your letter to Chief Justice Strutz of the North Dakota Supreme Court did you use figures comparable to that?

Mr. FRANK. What I probably did, because of the need of moving along, was simply send him a copy of the letter I sent to Chief Justice Kavanagh.

Mr. WESTPHAL. So then when Chief Justice Strutz wrote a letter expressing his concern about getting hundreds of cases dumped in the State courts in North Dakota, Chief Justice Strutz based that probably upon the information you furnished him, and not upon the studies prepared by the subcommittee that showed that only 29 cases would

have been shifted to North Dakota on the basis of the 1970 Federal caseload?

Mr. FRANK. On that score, I cannot help you. I simply do not know what the particular basis of that line was. That was not a product of my source.

Mr. WESTPHAL. In any event, the letter from Chief Justice Kavanagh to Senator Hart, which is attached to your addendum presented here to the subcommittee, contains Justice Kavanagh's statement that he has been informed that 17,000 is approximately the number of cases that would be shifted?

Mr. FRANK. That is right, and I think in his behalf, if I may, I would amend to the 14,000 figure I presented today.

Mr. WESTPHAL. Yes, but the point of the matter is, in your urging Justice Kavanagh to contact his State's senator, you mentioned figures of 17,000 and 20,000 as being the number of cases that would be shifted from the Federal courts to all of State courts and that is an erroneous figure; is it not?

Mr. FRANK. I think the latter figure is much better. I think we are around 14,000 now. I accept yours, and will yield to that view hereafter.

Mr. WESTPHAL. If I could just make one other statement here on the subject, while we are on it. I think you should also be advised that the subcommittee staff on August 10, 1971, when it had the State-by-State breakdown figures available, prepared them in a table form and mailed them out to every chief justice or to his court administrator in every one of the 50 States and we invited their comments and reaction on it and, to date, the only letters we have received have been from Chief Justice Strutz and from Chief Justice Roberts of Florida.

Mr. FRANK. You will hear from the Chief Justice of Nebraska, I suspect.

Mr. WESTPHAL. The Chief Justice of Nebraska is one of the seven chief justices whose Senator is on the subcommittee.

Mr. FRANK. That is right.

Mr. WESTPHAL. In writing to the chief justice of Nebraska, did you tell him how many cases would be shifted to this particular State as determined by the studies by the subcommittee staff?

Mr. FRANK. I did not personally correspond with the chief justice of Nebraska, but I would assume that probably the essentials of my discussion with Chief Justice Kavanagh would have been here.

Mr. WESTPHAL. Now, you have testified here that you are the official representative or the proxy of the bar associations of Utah and Arizona, Oregon and Hawaii; is that correct?

Mr. FRANK. Would you mind repeating the list? I did not hear you clearly.

Mr. WESTPHAL. Arizona, Oregon, Utah, and Hawaii?

Mr. FRANK. And Washington.

Mr. WESTPHAL. And Washington and, according to the tables which you have attached to your statement, Hawaii will have 26 cases shifted to it, Utah will have 68 cases shifted to it, Arizona will have 134 cases shifted to it, and Oregon will have 202 cases shifted to it; is that not correct?

Mr. FRANK. I assume you are reading from the table, and I take your word for it without rechecking it.

Mr. WESTPHAL. Now, then, you have attached to your statement a letter from Chief Judge Chambers of the Ninth Circuit expressing his opposition to the diversity provisions which you told us, while it is dated in 1965 or 1966, it is still his view today?

Mr. FRANK. I based it on the fact that I talked to him within the last 2 or 3 days by phone, read him the letter, said shall I present it or is this still your view, or something of the sort, and he said "Yes."

Mr. WESTPHAL. But, you do not want us to infer from that letter of Chief Justice Chambers that this represents the view of the Judicial Council of the Ninth Circuit, do you?

Mr. FRANK. I do not because it represents only the personal view and nothing beyond that.

Mr. WESTPHAL. All right, and also by attaching to your statement a resolution of the board of governors of Arizona, and the Arizona bar in 1965, you do not want us to infer from that that the Arizona bar has adopted the position, as adopted by the Ninth Circuit, do you?

Mr. FRANK. The position of the Arizona bar is as fully stated in the resolution and speaks for itself.

Mr. WESTPHAL. Well, what I am referring to is the short document attached to your original statement that was filed with the subcommittee, on page 28 or 29, which is a resolution of the board of governors of the State Bar of Arizona dated November 27, 1965. Are you looking at that now?

Mr. FRANK. Right.

Mr. WESTPHAL. And we are not to infer from that document that the board of governors of the State of Arizona has adopted the statement position of the Ninth Circuit?

Mr. FRANK. No. The words—you have to take the documents consecutively, Mr. Westphal. The resolution says in response to the request of the conference, and as I explained earlier, Mr. J. E. Simpson, the chief proceduralist of our bar in Los Angeles, asked the various States to take the position on this subject. In response to the Simpson request, State committee prepared and recommended the report which is the pages immediately following that resolution.

Mr. WESTPHAL. Well, I read page 28 as saying that what the board of governors did is in response to Mr. Simpson's request and was to adopt the report of the committee of the ninth circuit.

Mr. FRANK. Oh, no; there was no committee report of the committee of the Ninth Circuit at that time. They were just trying to formulate it.

Mr. WESTPHAL. What is the meaning of this language, "adopts as its own statement of 'its' committee"?

Mr. FRANK. Its committee means its own committee of the Arizona State Bar which immediately follows.

Mr. WESTPHAL. All right. The reason I asked you that is, as you may recall, but it is my understanding that a special committee of the Ninth Circuit Judicial Conference studied the ALI proposal back in that period of time, and they recommended against approval of the diversity provision of the ALI proposal; is that not true?

Mr. FRANK. I believe that to be true.

Mr. WESTPHAL. All right, and when that committee's recommendation was considered by the full number of persons in attendance at the judicial council gathering of the ninth circuit on two particular occasions, by a very strong majority of that Ninth Circuit Judicial

Conference it disapproved its own committee's report, and gave approval to the diversity provisions of the ALI proposal; is that not true?

MR. FRANK. Mr. Westphal, I am not able to say that is true and do not know. I will be glad to supplement the record, if I may, by having Mr. Simpson or somebody from that circuit write you, but I cannot answer.

MR. WESTPHAL. But, in any event we are not to take any reference to the Ninth Circuit here as contained in your statement as indicating any official position of the Ninth Circuit Judicial Council?

MR. FRANK. That is exactly right. I am not speaking for it in any way.

MR. WESTPHAL. Now, calling your attention to the table which is on page 15 of your original statement filed with the committee, as you have explained in the text the figures assembled by the Institute of Judicial Administration, that is the Fannie Klein group.

MR. FRANK. That is right.

MR. WESTPHAL. Those figures for the State courts reflect only the trial time or delay insofar as personal injury cases are concerned?

MR. FRANK. That is correct.

MR. WESTPHAL. All right, and those are selected, I take it, from States that keep a separate personal injury calendar or have a comparable calendar that Mrs. Klein evidently felt was one which reflected the trial time on personal injury cases? Would you make that assumption?

MR. FRANK. I assume—I would not care to go farther than that I assume—that the work is a highly reliable work, but it comes out of a little published book. The things you are asking about now are not explained in the publication, at least to me, and, therefore, I simply do not know.

MR. WESTPHAL. Well, according to the 1971 Annual Report of the State of New York, they do keep a separate personal injury or tort calendar in the State of New York. Are you aware of that?

MR. FRANK. No. I have never seen that document.

MR. WESTPHAL. And according to their 1971 figures for New York City (shown in the annual report of the administrative board of the judicial conference of the State of New York on page 301), which would include all of the boroughs, such as Brooklyn and Manhattan, their tort calendar was at 44 months. But their medium time for civil cases was 10 months. Their average number, average amount of delay, or rather the median was 14.9 months, so that we have got to understand that there may be a difference in what the actual calendar conditions are in that particular State court as compared to what it may be for just a tort calendar.

MR. FRANK. I am not sure if I am asked to acquiesce in the matter but I listen very respectfully.

MR. WESTPHAL. In any event, the amount of congestion on a tort trial calendar is of much greater interest to the plaintiff's bar such as the ATLA rather than what the civil case calendar delay may be as a whole.

MR. FRANK. Let me make this point because this is a pretty serious thing. The best comparison in America, I know, is by comparing the New York University figures of State congestion in personal injury

tort cases, and the Federal figures on jury trials. The Federal one is a little broader because it would include any jury trials as well as the personal injury cases. This is not a firm statement, but I would guess that probably within 80 percent they are the same thing and, therefore, I would say that it is really true that we are moving them to vastly more delayed dockets than would otherwise be the case, and that is really all we need to know.

Mr. WESTPHAL. Well, I have a couple of other questions about these figures on page 15 of your statement. Your table shows the IJA figure of Mrs. Klein 21.4 months for Minneapolis. According to the report from the State court administrator in Minnesota, 13.3 months is the average delay time of their civil jury calendar in Minneapolis.

Mr. FRANK. I assume, Mr. Westphal, that that includes a lot of things besides jury cases, and all Mrs. Klein purports to give us are the jury case records.

Mr. WESTPHAL. She purports to give us only the personal injury cases.

Mr. FRANK. That is right, personal injury, tort.

Mr. WESTPHAL. I can tell you, Minneapolis does not have a separate tort calendar or a separate personal injury calendar, and I have practiced there for some 20 years, and that is not a fact, and that is what it appears Mrs. Klein is representing in her tables here.

Mr. FRANK. Mr. Westphal, I am having trouble hearing. I am sorry. Are you saying that something about Mrs. Klein's table is inaccurate, or that—

Mr. WESTPHAL. Well, what I am saying is that insofar as Mrs. Klein shows the figure of 21.4 months for personal injury cases in Minneapolis; that Minneapolis does not keep its figures that way. As a matter of fact, the reports from Minneapolis, which is Hennepin County, shows that their delay time for civil cases, all civil jury cases, is 13.3 rather than 21.4 months that Mrs. Klein shows. Since there is such a large difference it would be helpful to know how she obtained her average.

COMMITTEE STAFF EXPLANATION OF MINNEAPOLIS FIGURES

The difference between the time to trial shown in the report of the Institute of Judicial Administration and the Annual Report of the Minnesota Courts (1970) is explained by the fact that the IJA sample included a number of old cases which were receiving special attention and also the IJA figures were for 1971.

A letter to the IJA explaining that sample was made available to the subcommittee and is printed below.

HENNEPIN COUNTY,
Minneapolis, Minn., May 14, 1971.

Mrs. FANNIE J. KLEIN,
Associate Director,
The Institute of Judicial Administration,
New York, N.Y.

DEAR FANNIE: As we discussed in Williamsburg we have been having a crash program to terminate 269 of our oldest cases. This has been going on for two months and we have terminated 193 of them and only have 76 cases which are two and a half years old (or more).

Some of these older cases are reflected in this study.

Yours very truly,

LEONARD A. JOHNSON.

Mr. FRANK. Mr. Westphal, let me say only this: I have known Professor Klein for a great many years. I regard her as one of the best statistical sources in America, and the Institute of Judicial Adminis-

tration is one of the worthiest bodies. The figures are published by the same body as Mr. Orison Marden who appeared here last week. I suggest that you permit me to get the facts for this portion of the hearing and make a photocopy of this as it relates to this matter and forward it to the Institute of Judicial Administration and ask leave to extend my statement in response, and I will get from them a response commenting on the statistical matter.

Mr. WESTPHAL. This is obviously the appropriate course for the subcommittee staff to have to take because I have pointed out to you that there is a discrepancy between the figures given by Mrs. Klein and the figures from New York, as well as the figures from Minnesota. So, it bears some further looking into.

COMMITTEE STAFF NOTE OF THE CALENDAR STATUS STUDY OF 1971

What the witnesses have referred to as "Mrs. Klein's tables" are in fact a report of the Institute of Judicial Administration entitled *Calendar Status Study—1971. State Trial Courts of General Jurisdiction; Personal Inquiry Jury Cases*.

First, the Institute report does not reflect calendar status generally. The report states:

As in the last fourteen years, the study is concerned with personal injury cases tried to juries. The Institute's staff is fully aware that this is a narrowly limited facet of the broad and complex field of adjudication. *The study reflects not calendar status generally, but the aspect which traditionally has received more attention.* (Italics added.)

IJA Report, pp. IV, V

Second, the preparation of the IJA statistics is not dependent on a court's maintaining a separate tort calendar. The tables in the report are prepared on the basis of information supplied by the clerks, judges and court administrators of the courts included in the report. The tables are based on information which is not readily available in the reports published by each jurisdiction.

Third, Mrs. Fannie Klein of the Institute of Judicial Administration also suggests that both sets of figures, issue to trial, and readiness to trial, be studied. The following table shows both figures for those state jurisdictions referred to in the testimony of Mr. Frank.

TABLE A.—CALENDAR STATUS STUDY, PERSONAL INJURY CASES

City	State court		Federal court month
	Service of answer to trial month	Ready date to trial month	
Chicago.....	61.7	-----	14
Brooklyn.....	51.9	36.3	16
Manhattan.....	49.9	35.3	27
Philadelphia.....	46.8	46.8	37
Jersey City.....	35.6	-----	26
Boston.....	35.0	-----	15
Detroit.....	34.3	114.2	23
Los Angeles.....	24.3	16.4	12
Minneapolis.....	21.4	13.6	6
Cleveland.....	127.8	110.8	20
Memphis.....	9.9	-----	11
Phoenix.....	21.7	12.1	15

¹ In 1970.

It should be noted that New York City courts have a separate calendar for tort cases, and the Minneapolis figures as reported by that court's administrative director are based on a sample which included a number of older cases being given special attention.

The complete calendar status study appears in Appendix III of the hearings p. 597.

Mr. FRANK. Mr. Westphal, all I can say is if I had to risk my chance of going to heaven on whether Fannie Klein was right or not, I would take that chance.

Mr. WESTPHAL. I have known her for a long time myself, and I am surprised she would make an error, if it is an error.

Let me ask you the same set of questions regarding Arizona, Mr. Frank. What is the delay time in the State courts for Maricopa County, Phoenix, Ariz.?

Mr. FRANK. We are around 21 months currently, on the last figures I think I saw, between ready and trial. Allow me to correct that if it turns out that I am wrong, but I believe that to be a figure I read a couple of weeks ago.

Mr. WESTPHAL. It is now down to 21 months in Maricopa County?

Mr. FRANK. I regret to say that down is the wrong word, having increased this year over what it was the year before.

Mr. WESTPHAL. But, back in 1966, 5 years ago, it was up as high as 30 months; was it not?

Mr. FRANK. May I take your word on that? We added a good number of judges. We had a decline and then last year we went up by a full 6 months. We got down to well below 21, and then swept up again.

Mr. WESTPHAL. But, in the Federal court in Arizona their average time on the civil calendar is about 7 months; is it not?

Mr. FRANK. Mr. Westphal, I have to take your word on that. I do not remember.

Mr. WESTPHAL. Well, that is the figure shown by the Administrative Office's annual report.

Assuming that 21 months and the 7 months are the figures we are dealing with in Phoenix, the fact that your Federal calendar is much more current in Phoenix is part of the reason you would prefer to have your cases in the Federal court rather than in the State court?

Mr. FRANK. It is a relevant factor.

Mr. WESTPHAL. All right.

Mr. MULLEN. Mr. Frank, I do not believe in the conversation that you had with Mr. Westphal that the question is whether or not Mrs. Klein's statistics are accurate or inaccurate. I think the point is that it may not be correct to compare the delay in personal injury cases from the State or cities you selected with the time that it takes to complete all civil cases in the Federal courts. The figures that Mr. Westphal gave, for example, for Minnesota or New York, which compared the time for all civil diversity litigation in the Federal courts with all civil cases in New York City or with all civil cases in Hennepin County, I think, is the most relevant comparison. That is what I think the point is.

Mr. FRANK. Mr. Mullen, may I meet that, please, squarely? In the first place, it is proper to compare plaintiff's personal injury cases. Your proposal as a practical matter, would move 9,898 cases of in-State plaintiffs. I have given you the figures somewhere or other, but those are going to be largely tort cases—let me put it in the round—what you are doing is kicking out 10,000 plaintiffs, most of which are tort actions and about 2,000 corporate cases, and now those 10,000 cases are overwhelmingly going to be auto accident cases. That is why I said earlier, if you want to abolish auto accident litigation, that is

one thing, but I do not see any point in moving it around. That is a correct parallel.

Now, one other point, Mr. Mullen, is immediately related to that, and that is that while the Federal cases are jury cases, not restricted to personal injury cases, I am sure you will find that 80 to 90 percent of the civil Federal jury cases are personal injury cases. It is the highest degree of correlation we can get. Mr. Westphal is respectfully in error in his analysis in that he is counting the civil motions practice in which such inclusion materially distorts statistics. As I get his figures from Minneapolis, for example, he has the general run of civil cases.

MR. WESTPHAL. The figures for Minneapolis, Mr. Frank, are not kept on the basis of civil motions practice, they are kept on the basis of all civil cases, which is the same basis on which New York keeps its statistics of all civil cases which show a 14.9 months' delay on the average and a 10 months' delay on the medium.

MR. FRANK. May I hazard a guess, Mr. Westphal, which is all I can do because I simply do not know. I believe what happens is that when the IJA sends out this request, sends the questionnaire in the cooperating counties, it then makes a special study for it and pulls together information and gives it to them, which is not otherwise published. Where they do not get that kind of help, then they simply do not have the figures. However, that is guesswork and I would prefer to leave it for the lady.

MR. WESTPHAL. Well, I am aware of those special studies also because special studies in Minneapolis have indicated that where they have an average statistical delay time of 13.3 months, that the cases that they were actually trying on a particular day, that that study was made of an average length of time on the calendar of 14.2 months, so it is within a month of what that figure is. If you make a special study, that is.

MR. FRANK. May I leave it this way, since we cannot profitably analyze it? May I adopt an anecdote which we have all heard where she sees her husband in the middle of a fight with a bear and she says, "Go it husband, go it bear." All I can say is that this is a war between Mrs. Klein and Mr. Westphal, and all I can say is, "Go it Westphal, go it Klein."

[A note of explanation appears at p. 288.]

Senator BURDICK. I am going to ask one question. As I listened to this battle of statistics, and I believe it is your contention that it is the personal injury cases that have the biggest backlog?

MR. FRANK. I believe of the 14 that probably 10,000 are going to be that.

Senator BURDICK. So it is personal injury cases that are clogging things and a thought came to me, what is going to happen if no-fault catches on?

MR. FRANK. Senator, this is what I am trying to say. In the lecture I gave in California, I advocated the view that we should find other ways of disposing of auto accident cases. This is created to reduce the pile and that does something, but just moving it, that does not do anything.

Thank you.

Senator BURDICK. Well, if no-fault comes in, of course, both piles go down.

Mr. FRANK. That is right; both go down and then we may get some place that should seem sound. We obviously do not need to settle that here.

Senator BURDICK. No.

Mr. FRANK. But, my point is that that goes to the direction of reducing the load, not simply shifting it.

Thank you very much for letting me come, Senator. I appreciate it.

Senator BURDICK. Thank you very much.

Our next witness is Mr. Wayne C. Smith, chairman of the Judicial Administrative Section of the American Trial Lawyers Association.

Mr. Smith, we welcome you to the committee.

STATEMENT OF WAYNE C. SMITH, CHAIRMAN, JUDICIAL ADMINISTRATIVE SECTION, AMERICAN TRIAL LAWYERS ASSOCIATION, SPRINGFIELD, MO.

Mr. SMITH. Thank you.

Senator BURDICK. You are chairman of the American Trial Lawyers Association, the Judicial Administrative Section?

Mr. SMITH. That is correct, Your Honor.

(The complete statement of Mr. Smith follows:)

POSITION PAPER REGARDING S. 1876

I am Wayne C. Smith, Jr., an attorney, with offices located at 1740-M South Glenstone, Springfield, Missouri. I am Chairman of the Judicial Administrative Section of American Trial Lawyers Association, and present the following as the position of this section regarding Senate Bill 1876 of the 1st Session of the 92nd Congress of the United States of America.

Before complete position may be reached, may we proceed on two assumptions. First, some regulation of the filing of suits in Federal Courts is necessary. Second, our ultimate aim is the obtaining of justice.

Our position is that our section opposes, without reservation, section 1302(a) and (b) in that these portions of the bill effectively deprive citizens of their right to use the federal courts where such use is needed to obtain justice.

Re our above assumptions. First, we presently have limitation of federal diversity jurisdiction. The amount in dispute requires some sizable controversy to invoke federal jurisdiction. The recognition of a corporation as a citizen of its state of incorporation and the state where it has its principal place of business, with further limitations in direct actions against an insurer, where the insured is not joined as a party defendant. It is our opinion that these limitations are sufficient and we now have a workable federal jurisdiction that produces most of the aims of justice. This latter for the reason that the act of invoking federal jurisdiction must by its nature begin by the election of counsel for one of the parties to litigate their complaint or defense in a court in which they believe there is a better opportunity to obtain justice. Of course, counsel may err in their opinion, but the fairly consistent selection of federal courts for certain types of litigation must be said to be the result of reflected judgment causing them to believe they have obtained justice.

It would seem that the proponent of section 1302(a) and (b) rely upon the fact that federal dockets are crowded and the vague theory that this area of litigation is the administration of a state right or law. We submit that in the area of crowded dockets, and almost without exception, the federal dockets are relatively current, whereas the opposite is true in most state courts. Such action, i.e., transfer to state jurisdiction: is not a cure of a problem, if there be one. It is rather a complication resulting in mockery of justice.

Pertaining to the claim that cases arising under state law should be tried in a state court, it is appropriate to review some thought supporting the origin of diversity jurisdiction. This subject was reviewed in the Constitutional Conven-

tion. Article III, section 2 of the Constitution provides that the judicial power shall extend to all cases of controversies between citizens of different states. The Congress has from time to time defined this grant of jurisdiction into its present form. The compelling motivation behind the vesting of the judicial power in the first instance was the fear that a citizen of Georgia would not be fairly treated in a suit against a citizen of Missouri in the state courts of Missouri. (Certainly the selection of states is purely a hypothesis.) Such fear of prejudice was evidently well grounded in that such fear still motivates the selection by one of the parties of federal jurisdiction. By way of illustration, a vacationer of Florida slips and falls on an alleged slippery floor in a motel in Taney County, Missouri. Taney County is a small Missouri county. The motel owner is a substantial and affluent citizen and well liked. Any attorney representing the Floridian would seek federal jurisdiction. This is not to fault the courts or the jurors of Taney County, Missouri. Rather, it is to accept a fact of life.

Another reason, and maybe the most compelling and cogent reason to maintain diversity in its present form is that there is no other jurisdiction in which the parties are citizens of the same sovereign, to-wit: the United States. This has to be of some comfort to litigants as witness the repeated selection of federal courts as a forum.

Also, we feel that change should be made only if it is overwhelmingly shown that the present system fails by reason of deficiencies obstructing justice. Losers in law suits have been known to blame everything but themselves, but after reflection, the writer has heard no complaints as to the justice administered in federal court. Not so re state courts in litigation between citizens of different states. Thus, we submit, that the complaint against present diversity reduces itself to crowded dockets. This is not a claim that merits much thought. This is the attack usually made when some litigation is afoot to remove trial before a court and jury and place the subject matter before some administrative tribunal. The attack is presently out of focus since the present proposed remedy is simply to require that this type of future litigation be filed in courts having a larger and more delinquent docket. This is not a solution. If more federal judges and courts are needed, provide them. Justice is a great sounding word. It should be as important as any obligation of the administration of government. If not, what are we trying to defend as a right of our citizens, and as an elusive goal that other countries have a right to elect as their choice.

The percentage of cases tried in relation to those filed is small. It is often said that it is rare when both sides know their law suit and are prepared that a trial is necessary. The federal code is frequently used as a model in reforming state procedures, though not always fully followed. The federal rules confine the issues, eliminate surprise and afford full discovery. In attaining these three facts, trials are frequently not necessary. Confinement of issues and full discovery is not always the goal of state rules of civil procedure. By reason of that alone, the quality of justice is raised in federal courts. On the other hand, the two systems working in the same areas can and do account for improvements in each and should be retained.

Practicality should be a goal. I cannot speak for most of the states, but it seems to me that Missouri would not be too far out of line with other states. In our state courts, the cost of calling a jury panel and the cost of the jury selected to try a case are for the most part paid by the county in which the case is tried. We have currently a very real problem as to the ability of some states, almost all major cities and most counties to meet their expenses in supplying good government. If we are to assume that the administration of law and justice is an integral part of good government, and the federal government through its executive arm proposes to supply funds to help cities, counties and states whose funds are presently said to be inadequate for that purpose, would we now improve that problem by adding more expense to states and counties to supply one of the essentials of democracy in a Republic of United States?

We submit the answer is self-evident. The Judicial Administration Section of American Trial Lawyers Association, speaking for its 25,000 members, opposes the proposed amendment as set forth in S. 1876.

Respectfully submitted.

WAYNE C. SMITH, Jr.,
*Chairman, Judicial Administration Section,
 American Trial Lawyers Association.*

Mr. SMITH. For the sake of brevity, and not trying to avoid any issue, I will try to prevent going into those specific areas that have

been gone into with Mr. Frank, and the questions that have been asked by this particular committee. Let me limit our position to what I would describe as the uniform or total administration of justice as the reason why we oppose section 1302 (a) and (b).

First of all, on the question of diversity and whether the fear was well-founded or not, there might be prejudice in a given State court. It seems that over a period of years, trial counsel has selected both from the plaintiff and the defendant's standpoints, so that we have some uniformity in that regard to go to Federal courts with certain types of litigation. Now, whether or not they made a mistake in going to Federal court is not important.

The thing that is important is that there is the uniformity of both the plaintiff and the defense bar in their opinion, that they believe that they can obtain better and more uniform justice in the Federal courts than they can in the State courts.

More recently, and in connection with no fault, damages have sort of become a nasty word. But, let me say this: being substantially a plaintiff lawyer, but also being engaged in a very general practice which includes the defenses of criminal cases and general trial work, general trial work in the area of wherever trial work may be needed, and being from a small community, I would submit this for this committee's consideration.

The question has been asked, and the one that is most frequently asked is whether or not a plaintiff, an in-State plaintiff, should be entitled to enjoy diversity jurisdiction as the result of an automobile accident that has resulted in damages to him. Let me address myself principally to the area in which I practice law most of the time.

Certain areas of Missouri are distressed economically compared to to certain other metropolitan areas. Let us assume that we have a gentleman injured who resides in Missouri, and we will say the city of St. Louis, and he is injured by a nonresident in southwest Missouri, and that by reason of venue restriction, he must file his suit in, we will say, Ozark County, the county seat of which is Gainesville, Mo. We will assume that this gentleman from St. Louis has an average monthly earnings of \$2,000. I think we must take cognizance of the fact as the jury, if he must try this case in Ozark County, unfortunately reaches just a little more than that as their annual income, and I will submit to this committee that the only place that this man can obtain justice, and I think that we have to go back and admit this if we are going to accept anything as factual, that any plaintiff who is injured would not take any amount of money that any jury might give him to have been put in the condition that he was in before the accident occurred. This is the theory upon which I have practiced law for many years.

Now then, the only thing that he can do, if he is going to receive justice, to receive adequate compensation for the damages which he has sustained, and I will submit to you, Senator, that both upon experience and practice, and admittedly my reason is, I think, that I can obtain a more just reward for my client in the Federal court under those given circumstances than I could, for instance, in Ozark County, Mo.

But, again, I submit to the committee that there is nothing wrong with this, if we are looking for adequate awards and if we are to assume that this is justice, and this is what we have to assume at this

time. Then I think that the only place that I may obtain that is in Federal court.

Now, let me get to another area.

Senator BURDICK. I missed the point here. Why would you not get adequate justice in the State court?

Mr. SMITH. Senator, an amputated leg in certain portions of southwest Missouri is worth \$5,000 or \$6,000, or at least there have been judgments to that effect. There have been findings that there was negligence that resulted in the amputation of this leg. This is an area that I practice law in, and I have been a strong believer in juries all of my life, and I will continue to be a strong believer in juries, but this is not justice in my judgment, assuming now that there is negligence.

Now, there can be other factors that can influence the amount of a verdict, but I say to you that a person who is not from an economically depressed area, and he mistries his case in an economically depressed area, does not have the chance of receiving total justice that he would have in the Federal court. Now, these things are backed up by experience of trial lawyers in all areas of trial work, and I do not really think that there is much question about that.

Senator BURDICK. Well, then, in that state of fact of an accident between A and B, who both lived in the same State, they would never get any justice.

Mr. SMITH. I am afraid to admit that I think that is true in many instances. Then we begin the game of figuring out, by change of venue, can we get some place where we can obtain total justice. Now, if they are both in-State defendants, then I admit that is purely a local State problem and one that the State itself has to learn to adjust and take care of. But, where there is diversity, I submit that the only place that the plaintiff and the defendant can both be citizens of the same sovereign is to defend itself in Federal court, and I think that is probably the reason Federal court diversity jurisdiction was established in the first instance.

Now, let me get on, and I will not quarrel with your statement that if they both live in the same State, and you have a venue that lies only in some economically depressed area, that the chances of obtaining total justice are very limited. I recognize that. All trial lawyers in the State of Missouri recognize that fact, also.

Now, we are not dealing with that, we are dealing with the diversity problem where total justice is obtainable, and then I think the next question that comes up and is of some importance is the question: Has diversity jurisdiction worked in the past, and I submit that it has. Now then, we get to what I think is another real important area, and an area in which the Federal jurisdiction is justified in this regard. And let me digress just a minute to give you a smalltown lawyer's experience with Federal courts.

When I first started filing cases in the Federal court in the western district of Missouri, after we had adopted pretrial order 1 and pretrial order 2 in the western district of Missouri, and if the committee does not know about these I will be most happy to explain them, but this is very efficient in bringing the issues that are involved in the lawsuit to a head. I determined in my own mind that at that time that unless I had a lawsuit that was worth in excess of \$100,000—and I have not had any, I hasten to add—that I would not file a suit in the Federal court

because of the vast amount of paper work that was imposed upon the lawyers by the court in order to get a case at issue and get it disposed of.

Unfortunately, at the same time I made that decision, I had still five cases pending in Federal court, and I still had to go through with the paper work that was necessary in pretrial order 1 and pretrial order 2 in cases that involved only something more than approximately \$10,000. But, certainly enough to incur the jurisdiction of the Federal court on the grounds of the amount involved.

In the process of handling these five next cases, I will tell you unequivocally they would have been tried under State practice, even though the rules of the Supreme Court of Missouri make adequate and fluent reference to the Federal rules from which many of our rules are adopted, and our pretrial practice in State courts is of such a nature that nothing is really confined as to the issues that are going to be tried, nothing is really confined as to the positions of the parties from which you may not go beyond, nothing is really confined as to the area of the testimony that will be covered in support of the propositions that you maintain and in support of the propositions that are properly at issue in that law, too.

In the process of handling these other five cases in the western district of Missouri, not one of these cases was tried because the administration of the Federal system, at least in the western district of Missouri, is such that it is impossible for a lawyer to get into a courtroom finally without adequately knowing what his lawsuit is about.

Now, if this be a criticism of lawyers, so be it, but the Federal system at least alleviates the problem of the possibility of a person being represented by an inadequately prepared lawyer. It is virtually impossible in our district for that to happen.

Now, you said, let us make the State do this. Well, we have been trying for many years with our rules of civil procedure with the State of Missouri, but there is no way that you can do it, and the reason for that is that the Federal judge commands respect, and he has the authority to do what he thinks is necessary to be done in the lawsuit. Now, if this be true, and it is, the attaining of total justice then, I submit, if the system is working at the present time, and it is working, that there is then no reason to remove that system, or at least that portion of it that is referred to in section 1302(a) and 1302(b).

Now, then, let us get to another area of what I regard as an extremely practical problem. It should be of great concern to this committee because it is of great concern to the practicing lawyers throughout the State of Missouri, and throughout other parts of the country. Mr. Westphal has said that there are really not so many cases involved in this area, but let us assume that the figure is 11,000 or 12,000, or possibly 14,000 cases that we are talking about involving diversity jurisdiction.

May I further assume that in the administration of justice we have repeatedly recognized that the maintenance of courts, and the availability of courts for the purpose of the parties being heard at issue is not only desirable, but that it is absolutely necessary under our constitutional and republic form of government.

Then we reach a point where we say to the States, and in particular I can devote myself here to the question of the State of Missouri, that

we will take these cases which have been adequately handled and administered by the Federal courts and we will remove them over to the State courts where they will be for trial, and where I will submit to you that the experience of almost every practicing lawyer in the country is that the volume of cases tried under State procedures is higher than the volume of cases tried under Federal procedures.

In other words, more cases are settled in the Federal courts than are settled in the State courts, and I take it that settlement means that both sides have been satisfied that justice has been obtained.

Then we go on from that point and we say with one area of our present thinking insofar as the administration of government is concerned, that State, counties, and metropolitan areas are not affluent enough to handle the costs of government that are mounting upon them daily. We relate this to crime, we relate it to all other areas, but it must be related to courts also, and I do not think Missouri is by itself in this regard. In the State of Missouri, the taxes, the costs that may be taxed against a losing party for a jury to be called to try a case is \$1 per day for each juror. The jury is paid not under the Federal system, but is paid \$6 for his attendance in court.

Now, who pays that \$5.00? Not the State of Missouri, not the city of St. Louis, not the city of Kansas City, not the city of Springfield, but the county in which this case is tried. Now then, if we have a system, and apparently we do have because there are vast discussions before Congress at this time as to the advisability of the Federal Government making direct allotments, and now I am aware of the fact that this is a controversial issue, but at least it is being thought about, that States and counties need help. Metropolitan areas need help in their expenses in the administration of government, and certainly the courts are a part of the administration of government.

If this be true, and we presently have a workable system, are we going to accomplish justice when we say to a small county we will transfer the expenses of the trial of this case over to you because we are going to limit diversity jurisdiction for the simple reason that Federal courts may be crowded in certain areas.

Now, let me just be a little bit specific, and not supported by any direct figures, but supported by my own experience, and I am sure it would be supported by my three circuit judges in Greene County, we have had over the period of the immediate 2 years preceding the fall of 1970, had juries that are at our disposal at most any time that it was necessary to try a case. Let me hasten to add that a part of the blame for the thing that has happened can be thrown back on lawyers.

But we learn from experience, the same as everybody else does. We did in some instances abuse the calling of juries in Greene County because they found that they did not have adequate work to occupy their time.

Now, the county court got to reviewing this situation, and the county court in Missouri is in no sense a judicial organization, but is simply an administrative organization for the dispersal of money to take care of the costs of the operation of the county. And they decided that we had better severely limit the number of juries that are going to be made available for trials in Greene County.

We have gone from a very progressive, current trial docket, to one that is in the short time since the fall of 1970 extremely loaded at this

time. We have limited jury availability to us. We meet on a Monday morning and we call 25 to 30 cases in one division, and obviously, these cases are not going to all be tried that week, and they are not all going to be disposed of that week, and those litigants and everybody else are dissatisfied with the system as it exists at this time.

Now, then, if we take from the diversity docket of the southern division of the western district of Missouri in the Federal court which sits in Springfield, and transfer the diversity cases back over to them, it seems to me you have got an accumulation of a number of cases where the chances of obtaining the totality of justice are limited by reason of the fact that you have transferred from a jurisdiction that can adequately handle the issues that are involved in that last suit to one which cannot, and one which will not be able to, under our present existing system.

Now, again, Mr. Chairman—

Senator BURDICK. What you are saying, then, to me, is that it is impossible to get justice in that State, in the State courts?

Mr. SMITH. I am not saying that, Your Honor. What I am saying is that you have—and maybe if I reduce it to very simple things I can state my position—I am saying that you have impaired the administration of justice, that you have delayed it, that you have thrown the cost of this into an area that can ill afford to accept it from a jurisdiction that presently is doing a good job in the administration of justice.

I say to you that the administration of justice that we get in Missouri is one that I am satisfied with, and I have been practicing there since 1934, and I do not think that I would stay there if it was not for that fact. But I will say to you, without equivocation, that I am far better satisfied with the fact that all parties have received better justice where we are in the Federal courts than where we are in the State court.

Now, do not ask me to comment on the superiority of the Federal judges over the State courts because I am going to have to go back to Missouri at 2:20 this afternoon.

Senator BURDICK. Well, the figures just given me by the staff show you had last year 71,000 cases filed in the State, and this is in your State.

Mr. SMITH. Missouri?

Senator BURDICK. And the shift by reason of this act would shift 316 cases, and the record shows nationally that 84 percent are settled.

Mr. SMITH. You mean of the Federal cases?

Senator BURDICK. Yes. So, you have just gotten a drop.

Mr. SMITH. Well, Senator, I would say to you, and again, this is nothing more than my opinion, and that is all I can express in this connection, but I will say to you that based upon my experience, and based upon the experience of some men who I know are in court constantly because that is the way in which they make their living, that of the 84 percent of cases that are settled in the Federal court, that you could take of that 84 percent, 42 percent and transfer it back to the State court, and they will not be settled simply because defense counsel would just as soon be polite with you, and wait until you get right up to the day of trial, and then start out to trial, and then find out whether or not they liked the jury, whether or not they like a lot of other things in the courtroom in cases that should be settled and would be settled under the Federal practice.

Now, I think that is important, not to trial lawyers, but it is important to the people who have to go to the courts to obtain justice. And I think that is really what we are talking about.

Senator BURDICK. Well, in view of what you said, it is tough on a Missouri plaintiff that has to sue a resident, is it not?

Mr. SMITH. Yes, it is.

Senator BURDICK. Under these conditions?

Mr. SMITH. It can be in some circumstances. And, please, let me limit this, too. You see, I am really a little town, country lawyer. I cannot give you the experience of St. Louis.

Senator BURDICK. How large is the town of your residence?

Mr. SMITH. About 100,000.

Senator BURDICK. Well, I want you to know that you call yourself a smalltown lawyer, but the largest city in my State is 50,000.

Mr. SMITH. Well, I am rather familiar with some lawyers, and I am not sure whether it is North Dakota or South Dakota, but maybe I had better keep my mouth shut for a minute. But I am aware of the fact that there are decidedly less urban areas in this country than Springfield, Mo. But the fact has not been brought before the committee that we in Springfield do not limit our practice to Greene County. For instance, we will go to Ozark County or to Christian County.

Now, these are county seats of less than 3,000 people, the total counties, and it would not run 10,000 people in most instances, and then we are going to say to these people, you are going to have to observe the cost of these trials that we are going to transfer back to you. And I submit that in the totality of the background of the justice obtainable in the Federal court, that the problem is of the jammed up docket in the Federal court, which is not going to be very greatly relieved by the diversity provision.

Senator BURDICK. That is not the basis of the legislation. It has nothing to do with congestion. This is just to be a logical separation of jurisdiction. That is what the purpose of it is, as I understand it.

Mr. SMITH. It originally did not start out as that, but there has been a lot of information published concerning it, the jammed up dockets that exist in Federal courts. And, of course, I think this is the Federal problem where there is diversity of citizenship. Now, I agree wholeheartedly with you that if the State says to their State citizens, we cannot adequately administer justice, there is not anything you folks can do about that.

Senator BURDICK. If you do not, as a matter of fact, there is going to be a growing clamor for more cases to go to the Federal courts.

Mr. SMITH. I am sure that is true.

Senator BURDICK. I am sure that the county commissioners would not mind if you shifted them all right now, would they, with the jury costs that you referred to?

Mr. SMITH. Unfortunately, and you people are more aware of this than I am, the growing responsibility of administration of government in small, isolated counties cries out loudly for the consolidation of various counties so as to cut down the cost of administration, where it calls for many other reforms, where it calls for direct Federal help. Now, those are the things that are necessary, as we look at the country today. This is not just Missouri, it is all over the United States.

Senator BURDICK. That is the flavor I get from your testimony.

Mr. SMITH. I think it is a very real problem, Senator also that to say to a State that even if you are only sending back 300 cases to us, you are sending back something that we are woefully unprepared to handle, and we are doing it from a system that is not only adequate, but is superbly qualified to handle this.

Now, there are Federal judges. There are good ones, bad and indifferent. This is true throughout the rank of judges in States or wherever you may go. That is true of human being, generally. But, generally speaking, Federal courts do get justice administered more quickly, more justly and more fairly to everybody involved. And I just think that this ought to be the problem that we are attacking, and that we ought to take a position that maybe our system is not perfect now, and maybe in a State a defendant should have a privilege of going to the Federal court.

But I do not think the removal of the plaintiff from the availability of Federal courts, or the removal of a corporation because it has a local establishment answers the problem.

Senator BURDICK. Well, that more or less answers my first question. You seem to agree that the defendant should also have a choice as to which forum gives him the best chance of winning a lawsuit, and your answer would be in the affirmative, you would give it, give the State defendant the right to shift his case?

Mr. SMITH. If there be diversity, and counsel feels that his chances of the administration of justice are better, I see no reason why either side, one or the other, should be preferred.

Senator BURDICK. But, on the other hand, the defendant cannot transfer back to the State court, if he once is placed in the Federal court. He does not have the same option as the plaintiff.

Mr. SMITH. No. I cannot agree with that, Senator. The election is exercised by counsel for either one side or the other, and once exercised the Congress has given that jurisdiction, and given that election to the party.

Senator BURDICK. The rules are that the plaintiff can go into a State court or the Federal court. Now, once he goes to the Federal court the defendant has to go there, too and with the diversity the defendant cannot go back to his State court.

Mr. SMITH. I think that is true.

Senator BURDICK. So that the options for the plaintiff are greater than for the defendant, no matter how you look at it?

Mr. SMITH. I am not sure I would agree with that because our division of diversity at this time has been limited by the fact that if there be a resident of Missouri, for instance, who is named defendant in a case, that this will defeat Federal jurisdiction if the case is filed on the State court to start with.

Senator BURDICK. No, but if your defendant, if your client is a defendant and is a resident of Missouri, and he has an accident over in Arkansas, and the case is brought up by the plaintiff in the Federal court, they stay in the Federal court. There is no option there.

Mr. SMITH. I think that is true because that election has been given to start with.

Senator BURDICK. That is right, but the plaintiff alone has the election to go either in the State court or in the Federal court.

Mr. SMITH. I agree that that is true, Senator, and I think I should not be misunderstood in this regard. I am not saying to you that diversity should not be reviewed from time to time, and if it be found to be unfair that something be done about it, because that has been the history of diversity anyway. It has been modified from time to time. What I am saying to you specifically here today is that I do not think that the present proposed amendment affects total justice to the parties.

Senator BURDICK. Well, in your example in your prepared statement where you say a Florida visitor was injured in Taney County, Mo., I do not see the problem there because under the bill as an outsider he is still allowed to sue in Federal court.

Mr. SMITH. It is a poor example, and I will save your question——

Senator BURDICK. He is still allowed to sue in the Federal court.

Mr. SMITH. It is a poor example, and I will save your question for you and relate simply the first case that I tried when I came to Springfield, Mo., from St. Louis. It involved a foreign corporation and a resident of Missouri. The suit could have been filed, had it been desired to be filed, in Taney County. An evaluation, of not myself, but of several other law firms mixed, fixed that case at something in the neighborhood of \$3,500, which to me was ridiculous, and it went to the Federal court and the verdict obtained was \$9,500. There was a motion to attach the cost against the plaintiff and the judge said, "I will not do so, because I would have approved a verdict of \$15,000."

Now, take my word for it, the judge would have supported a verdict of \$15,000, but in Taney County it was \$3,500. Now, this speaks pretty loudly, to me, and to a man that makes \$400 a month, and that is a lot of difference to him, and it means a lot to him. It means a lot to me as attorney for the plaintiff, too. I will not deny that for 1 minute.

Senator BURDICK. But, of course, being a practitioner myself, I understand that the attorney for the defendant might disagree with you.

Mr. SMITH. Well, they almost always do.

Senator BURDICK. Getting back to this Florida visitor, instead——

Mr. SMITH. He can still file his suit in Federal court under your proposed amendment.

Senator BURDICK. Suppose the Florida visitor, instead of being injured, negligently burned down three rooms of the motel? Is there any local prejudice which the motel owner needs to escape by removing his action to the Federal court in Missouri? Would he suffer any prejudice by having the lawsuit in Missouri?

Mr. SMITH. If the visitor burned down his motel?

Senator BURDICK. Negligently.

Mr. SMITH. He would select in the first instance the jurisdiction that he wanted.

Senator BURDICK. Right.

Mr. SMITH. And if he was well known and well liked in Taney County, I would assume, as a practical matter, that he would file his lawsuit in Taney County, Mo., and I would further assume that as a practical matter, that the resident of Florida would want it tried in Federal court.

Senator BURDICK. That would be his option under this bill.

Mr. SMITH. That is right.

Senator BURDICK. So, this bill would not hurt this situation a bit.

Mr. SMITH. I said that was a very poor example I gave you. The alternate example, though, of the resident in Missouri whose case did

obtain better justice, in my judgment in the Federal court than was ever possible to him in the State court.

Senator BURDICK. Well, that in summary is really your testimony, that you feel that there is better justice in the Federal courts?

Mr. SMITH. Very positively I feel that, and very positively I think I can say that American trial lawyers feel that same way.

Senator BURDICK. Well, thank you again, and your testimony will be considered very carefully.

Mr. SMITH. Thank you very much.

Senator BURDICK. Our next witness is Frederick P. Furth, a practicing lawyer from San Francisco.

STATEMENT OF FREDERICK P. FURTH, LAWYER, SAN FRANCISCO, CALIF.

Mr. FURTH. Thank you, Senator. I appear to oppose section 1302(a) and 1302(b) of Senate bill 1876, and I do not want to take too much time because I know that we are running a little late, and the first question that I would ask is why do you want to make this change? Is it because there is a certain amount of logic, as the Senator says, there is a certain amount of logic, to having the Federal court in the Federal business and the State courts in other kinds of business? Is it a desire to unburden the Federal courts because they are too burdened?

I can tell, Your Honor, and maybe I should identify myself just a little bit, I speak with the authority of the Lawyers' Club of San Francisco, which is composed of about 3,000 of our 5,000 members. I also speak, and I think with more weight, from my own ideas, my own experience. My own experience is that I have a 7-man firm, that we do almost exclusively plaintiff work, that we do a very heavy diet of Federal litigation. I have litigated both in New York—I am a member of the New York bar, the Michigan bar, the California bar, and the District of Columbia bar, by examination—and I have been around and devoted my life to being in the trial courts, both in the Federal and State courts.

The first thing I can say unequivocally to Your Honor, that the Federal judge is a better judge all around, with certain very great exceptions, than the State judge is, and the reason is, I think, that he is paid more. It is a more important position, it is a more respected position, and more able lawyers seek to obtain that position, and that is why he is.

Second, on the court congestion, I can tell you exactly why the court is congested. The courts are congested because of judges, and that is the primary reason. Nobody wants to say that, and everybody is afraid, but the courts are congested because the judges do not sit down and say, "Look, this case is going to trial. Now, let me tell both parties that this case is going to trial."

I had a very nice experience this year with Judge Turintine down in the Federal district court in San Diego. I filed the case down there because my client—the ones I represent mostly are small business, franchises, dealer companies that go out of business—I filed a case down there in San Diego because the contract they had entered into required that the case be in San Diego. After the case was filed, a month went by, and Judge Turintine sent an order, called a status

conference order in which he listed eight requirements, one of which was what day we are going to trial, and this was an antitrust case, fairly common. When we got down to see the judge, the first question he asked was, "Gentlemen, when is the trial date?", and I said, "Well, Your Honor, we will be ready in 2 or 3 months," and the judge said, "How about December 14?", and, Your Honor, the case is going ahead on December 14. So, the No. 1 problem you have got then, if you are attempting in attacking this legislation to try to alleviate the burden of the courts, I think it is that you are passing up some great opportunities in aid. I think you want to say something?

Senator BURDICK. Yes, I hope that you do not put all of the blame on the judges, because I have been on a few calls of the calendar in 25 years of practice, and I have seen lawyers procrastinate about where their witnesses are, so some of the blame is on the lawyers, too.

Mr. FURTH. I would agree with that, that the defense bar, but I have rarely seen the plaintiffs' bar delay. So I think it is the defense rather than the plaintiffs' bar, and I exaggerate, of course, to make a point, but it is T, S, and D, trip, stumble, and delay. The point I am trying to make is that everybody is afraid to say anything about the judges. In my judgment, we have handled a lot of cases and we are up-to-date basically in our Federal and District court cases, at least a number of judges are, and the reason is they take command of the case with the force of a field marshal and make sure that it is going to go to trial and everybody knows it.

Now, when you talk about all of these statistics, my only comment on that would be that I have settled a lot of cases by telling the defense bar that, listen, either we settle this case, or I am going to take it to Federal court, and basically I am representing local plaintiffs, and if you take away that option, of course, I can get around it. I can run down to a court in Nevada, and then I will be a foreign resident, or I will travel back and forth, you know, and get around it. What I am saying is there is no real logical purpose. If I was in court in Boston, I would run up to Connecticut, and run back and forth, or something like that, or if I am in New York, and I am looking for a way around it, I will go back and forth, but I think the idea of the ability to go to Federal court, or to be able to tell the defendant before you file the case, and you say eight out of 10 cases are settled, and I agree with Your Honor, that is exactly my experience. Eight out of 10 cases are settled that are filed, but there are a lot more cases that are settled that are never filed, and one of the clubs I continually use to get what I consider a just settlement is I can go to a court which can actually try the case in less than 24 months, as distinguished from the State court, which is 5 years away.

The only argument that I could think against this, and to give myself a little credibility with the Senator, is to say that, well, the defense bar often used this technique when the case is filed in the State court of throwing it up to the Federal court, by removal, and then, of course, if the lawyer is not familiar with the Federal courts, and a lot of lawyers are not, then he becomes frightened, or he has to bring in some specialist, or he has difficulty. But, I think the idea, if Your Honor could see in the metropolitan area of San Francisco the difference between the State courts and the Federal courts, and Your Honor was representing people, again, what we should be deciding, Senator, in my judgment, is what in the interests of justice should be done, not

from logical progression, on the basis of the way the world should be, but what in the interests of justice should we do. I sit here, and I think to myself, now this has to be responsive Government, because that is what everybody is talking about. And, as somebody between the two generations, between your generation and the younger generation, I see you both. I have been going at being logical, but the biggest problem I see is the responsiveness, is the established generation responsive to the rest of the people. Now, I do not get any complaints from anybody in my conversations around town about the administration of justice, except that it takes time. That is what everybody is concerned about. Some guy out on the street who lived out in the view of the Golden Gate, his main concern is that it takes so long, you know, you have had this case 3 years, Mr. Furth, and why did you not get the case to trial. Well, I have done everything I can, but take the judge to dinner, to get the case to trial. I do not take the statistic of 350 cases being shifted in California as an indication of judicial business, because I do not think it is a correct figure. There are many cases that are solved in California as a result of streamlined procedures of the Federal court. Do you realize, Your Honor, that if you have warranty claims against General Motors, for example, and if it is a complicated case, that your chance of getting to trial short of the absolute required 5 years in the State courts are nil. On the other hand, and when you are in that State court, you are going to get a different judge on every hearing. What I am saying is that in the State courts, you see, you do not have assigned judges, and in the Federal court you do, and so the judge becomes familiar with the case and he can pursue it.

Now, if you really want to make—and if I may make an extra comment—if you really want to attack some of the problems that you have, I suggest you look—I suggest you look at the subpoena power of witnesses to permit witnesses to be subpoenaed anywhere in the country. I suggest you eliminate the service of process by marshalls. It is a ridiculous practice in this day and age. There is need for more logical steps to take depositions, and the need for local subpoenas is ridiculous. We spent all kinds of judicial time running from San Francisco to Philadelphia to issue a subpoena. You prepare for a case for trial for months in Tucson, and then the judge grants a new trial after denying all of the jury instructions, and for 3 months again, we are going to tie up the Federal district court, and there are a number of tremendously substantial things.

The point I think you have in diversity jurisdictions, is that if you are going to throw it away, is that you have lawyers like myself who practice in both the Federal and the State courts and are continually trying to get the State courts to follow the practices of the Federal courts. And to take away this very important power, which is of the plaintiff, the plaintiff—and it is basically the plaintiff who is paying the cost—and it is not big companies who are going around suing little people, it is always the little people suing the big companies; and to take away from the plaintiff the option to go to the Federal court, I think, is going to be a substantial detriment.

Thank you.

Senator BURDICK. Counsel wanted to ask you one or two questions, and if you do not mind, I will go down and make a rollecall, after which we will be in adjournment until the sound of the gavel.

Thank you very much.

Mr. FURTH. Thank you.

Mr. MULLEN. Mr. Furth, I just have a couple of questions on your statement.

Mr. FURTH. Yes, sir.

Mr. MULLEN. You are a practitioner in San Francisco, and you said you do mostly plaintiffs' work, is that correct?

Mr. FURTH. That is true.

Mr. MULLEN. Is there another group, a bar group in San Francisco besides the Lawyers' Club of San Francisco?

Mr. FURTH. There is, and it is called the San Francisco Bar Association, and I called them and asked them whether or not they would permit me also to carry their endorsement. I talked to the president of the San Francisco Bar Association, and he said he would have to circulate it and we could not do anything.

The Lawyers' Club is a little more active, and it is a little more plaintiff oriented, a little more aggressive. I believe, however, with the presence of people like Bill Gossett, this is the first time that I have ever aligned myself with the defense bar, and if you think you are doing some favor to the plaintiffs by eliminating this diversity jurisdiction, it just is not so.

Mr. MULLEN. The bill does not eliminate diversity, it revises it.

You commented on the use of the master calendar in State courts. Have you made any progress in encouraging them to adopt individual calendars in California?

Mr. FURTH. That is very difficult, a very political type of thing, and the State courts are much—all organizations of State courts are much more political, it is much more political than the Federal courts.

Mr. MULLEN. What efforts has the Lawyers' Club made to get the adoption of the individual calendar?

Mr. FURTH. I cannot say.

Mr. MULLEN. And again, you touched on this point once before, but there are only 304 cases which would be estimated to be shifted under this bill compared to 103,000 civil cases commenced in California in 1970.

Mr. FURTH. May I ask you a question?

Mr. MULLEN. Yes.

Mr. FURTH. What conceivable reason can you have for eliminating the plaintiff from access to Federal courts? What is the reason for all of this? Is it some divine inspiration of logic?

Mr. MULLEN. As explained in the American Law Institute study, the rationale is that the purpose of diversity is to protect against potential bias toward an outsider, and that this bias does not exist for the resident plaintiff.

Mr. FURTH. Well, you see, let me tell you the bias you are talking about was the bias of not being able to give an adequate reward.

Mr. MULLEN. That is bias that exists because of inadequacies of the State judicial procedure.

Mr. FURTH. Do you know who the American Law Institute is? They are a bunch of old foggy professor types that self-generate themselves, and Columbia and Yale, and Yale Professor Moore. He claims not, but it is Columbia and Harvard, and they are not responsive. You do not get onto any of their committees. And look at the American Bar Association. That is not responsive. Do you see any men under 40 on the judicial committee to review judicial selection? There are not any. The American Bar Association membership is about as important as the *Reader's Digest* membership, if you want to paraphrase Mel Belli.

Mr. WESTPHAL. Are you a member of the American Trial Lawyers' Association?

Mr. FURTH. No, I am not. I do not do a lot of P.I. work.

Mr. WESTPHAL. And then you say you are a seven-man firm, who exclusively represents plaintiffs?

Mr. FURTH. Right.

Mr. WESTPHAL. But not in personal injury?

Mr. FURTH. Not heavily; no.

Mr. WESTPHAL. You do more breach of warranty and business—

Mr. FURTH. Breach of warranty contract suits, many suits that naturally fall in the Federal courts, and would not be affected by this like the antitrust laws, security laws, dealer days in court act.

Mr. WESTPHAL. Do you equate the term justice and full adequate award in the same term?

Mr. FURTH. I think that justice, what I consider just, is a fair and reasonable compensation to the person for what has occurred to him, and that will go closer and closer to speculation based upon how much the defendant's acts have caused it to be difficult in computing the damages.

Mr. WESTPHAL. But in pursuit of that kind of justice, should not the plaintiff and the defendant have the same choices and options as far as the foreigner is concerned?

Mr. FURTH. Sure. I think the defendant should have the right to go to the Federal court, too. Do you, therefore, conclude that because there are some inequities between having the defendant being in one position and the plaintiff being in the other—there are all kinds of inequities in the Federal Rules of Procedure. This is just one small one. Let me ask you a question: Why do you ask that question all of the time? Does that mean, therefore, that if you really believe what you are talking about, then why do you not eliminate diversity completely? Why do you not just eliminate diversity?

Mr. WESTPHAL. That proposal was considered by the ALI committee, and was advocated by Justice Frankfurter and Judge Friendly and others for years, but nobody has ever gone that far, and nobody intends to go that far.

Mr. FURTH. Not if there is no prejudice, and then you ought to be able to do it.

Mr. MULLEN. The judgment of the American Law Institute was that there still remains prejudice or the potential of prejudice against an outsider, but it would seem that you are saying that if you are not fortunate enough to have a nonresident party to sue, you may suffer great injustices in the State court in California or other States. If you are not fortunate enough to have a diversity of citizenship, you may not achieve adequate justice.

Mr. FURTH. It happens all of the time, if you are a local action, and you are not able to get to the court, get to trial in 5 years.

Mr. MULLEN. So what you are saying is that there is a terrible inadequacy in the State court system?

Mr. FURTH. Of course there is, and of course I am saying that, and so, you want to increase the inadequacy and increase the injustice by dropping more cases over on them. And how do you end up, therefore, coming to the conclusion that you have done justice, that you have been responsive to the people by doing this act? What I say, and let me just close, and I am sorry, and I hope you will convey some of these

thoughts and ideas to the Senator, and I did not mean to interrupt. Let me say this. You yourself look at the American Law Institute, and you tell me whether or not they are representative and responsive of this country and the parties in court, and you tell me how many of these people actually participate in trials. How many of these people are in the State and Federal courts? And when you tell me that, you will come to the conclusion that they do not have the background except some theoretical ivory tower type background. They do not have the background because they are not there, and it is very easy in these hallowed halls here with all of this wood, and think of what is logical. But, if you would go out and find out what is actually happening in the courts, which I assume you will, and I hope you will, and you find out, you find out the way the courts are organized, and the difference between the systems, both State and Federal, I think you will want to hold on to diversity as much as you can, and I hope that that will have an effect on the State courts system.

Thank you very much.

MR. WESTPHAL. Mr. Furth. Just one thing. I practiced law for 20 years and did nothing but trial work, was in court constantly. Have you looked at the membership list of the ALI to see how many practicing lawyers belong to the association?

MR. FURTH. I would like——

MR. WESTPHAL. Have you looked at that, Mr. Furth?

MR. FURTH. Have you looked at who voted on this proposal from the ALI?

MR. WESTPHAL. You are not answering my question, you are just trying to argue.

MR. FURTH. Of course I have not looked at the list. I do not have it. I would be glad to receive it from you. But, I would also like to ask how many people you think on that list, people who voted on this proposal actually voted on it? When you ask a question, did the bar convention approve it, the bar convention is not very responsive either. Who gets appointed to bar conventions? Have you ever studied the system? It is preposterous how the delegates get appointed to the bar convention. Look at the number of people who voted for this proposal, and let us take the list, a list of those, and I will try to get a list and send it in.

MR. WESTPHAL. It is my understanding that the California bar situation in San Francisco—that the San Francisco Bar Association is one group and the Lawyers' Club is another group.

MR. FURTH. I belong to both; that is true.

MR. WESTPHAL. And the members of the lawyers' club had a difference with the bar association in San Francisco, and so you are in different bodies.

MR. FURTH. We had a difference about 40 years ago when I was not around, and the difference is that the San Francisco Bar Association was not responsive enough. But, if it will help you to vote against it, or urge the vote against it, I think I can get the San Francisco Bar Association to endorse the position as being opposed to it, and may I submit a letter, if I can do that, and then I will give you the conservative group and the liberal group's view, and maybe between the two, justice will result.

MR. MULLEN. Thank you.

(Whereupon at 12:35 p.m., the hearing was adjourned subject to the call of the Chair.)

THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS

WEDNESDAY, NOVEMBER 17, 1971

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN
JUDICIAL MACHINERY OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 6202, New Senate Office Building, Senator Quentin N. Burdick (chairman of the subcommittee) presiding.

Present. Senator Burdick.

Also present: William P. Westphal, chief counsel; Michael P. Mullen, assistant counsel; and Kathryn M. Coulter, chief clerk.

Senator BURDICK. Today we begin our second set of hearings on S. 1876. We will hear testimony on proposals concerning multiparty-multistate diversity jurisdiction. We will also hear testimony on choice-of-law problem as it arises in general diversity litigation.

The American Law Institute, in developing their proposals, recognized that the complexity of modern society often resulted in transactions, or legal relationships, between citizens of many States. And that the effective resolution of such controversies posed special problems in a Federal system such as ours where traditional notions of jurisdiction were limited by the territorial boundaries of the States. Of course, Supreme Court decisions such as *McGee v. National Life Ins.*, 355 U.S. 220 (1957), have extended the potential reach of State tort jurisdiction. Many States exercising this power have enacted "long arm" statutes of wide applicability. Ten States had such laws when the ALI first made these proposals, and 21 States now have general long-arm statutes. Yet, there remains a sizable number of States without adequate provisions for insuring citizens an adequate forum in which to resolve their legal disputes.

Since the special jurisdiction proposed for dealing with these multiparty cases necessarily will draw citizens from many States, the ALI proposal also recommends a flexibility in developing choice-of-law rules. I will not further attempt to explain these proposals since we are privileged to have with us this morning two men, highly qualified to address each of these problems.

Our first witness this morning will be Professor Paul Mishkin, who is a professor of law at the University of Pennsylvania, where for a number of years he taught a course on the Federal courts and the Federal system. He has also authored a number of important articles on the jurisdiction of the Federal courts, and, in addition, Professor Mishkin served with Professor Richard Field as a reporter for the

ALI study which drafted the proposal we are studying today. So, we are very pleased to have such a distinguished witness who has such a detailed knowledge of the legislation we are now considering.

Senator BURDICK. You may proceed.

**STATEMENT OF PAUL J. MISHKIN, PROFESSOR OF LAW,
UNIVERSITY OF PENNSYLVANIA**

MR. MISHKIN. I am honored by the invitation to appear. I will speak directly to the multi-party-multi-State proposal in the form of a statement and then, in response to your request, respond to one of the speakers that you heard earlier regarding the diversity jurisdiction generally, Professor Pelaez. As you recall, you asked if I had any comments on that, and I will add those informally afterward, if that is all right.

The problem which this proposed new head of diversity jurisdiction seeks to meet is small in numbers, but important when it occurs. It is not that multi-party-multi-State cases are rare; in these days they certainly are not. Even those where dispersed parties must be gathered in to achieve a just adjudication of the controversy are not that infrequent. It is rather that the greatest proportion of these cases can be fully handled by State courts, and are. Moreover, since these cases are generally governed by State law, it is entirely appropriate that they be adjudicated in State court when those courts are able to do so.

At the same time, it is not uncommon that the parties are so dispersed among several States that no single State court is able to obtain jurisdiction of all those necessary for a just adjudication of the case. The States are no longer as restricted as they once were in securing the presence of distant parties, and they have made great and effective strides to extend substantially the reach of their court process. But whether as a result of the State's failure to reach out as far as it might, or because of remaining constitutional limits on a State's jurisdictional grasp, there remain circumstances where no State court can gather to it all the parties who must be joined in order to have a just adjudication of the dispute. When that occurs, under existing law and the present judicial structure, the only available alternatives are for a State court either to dismiss the case entirely, or to proceed as best it can with those parties whom it does have before it, seeking to minimize the harm to them and to the absent persons. The Federal courts are in essentially the same situation.

Process of the Federal courts generally parallels that of the State courts, although special provision is made for bringing in an additional necessary party from outside the State but within 100 miles of the courthouse. (Federal Rule of Civil Procedure 4.)

Ordinarily, in these circumstances a court with jurisdiction of some of the parties will be able to do something effective and, faced with the alternative of dismissing the plaintiff's claim entirely, will take the case and do its best. But there are cases of this kind in which the courts will dismiss, with the result that a party may be left entirely without any court to hear his claim.

Let me give as an example a case decided earlier this year. A man named Haas, a citizen of Ohio, sued the Jefferson National Bank of Miami Beach, seeking an injunction requiring the bank to issue shares

of its stock to him or, alternatively, money damages. Haas alleged that he had made several agreements with one Glueck, also of Ohio, for the joint purchase of Jefferson Bank stock. The certificates were to be in Glueck's name, but Haas was to retain one-half ownership. Haas alleged that he had paid the agreed money to Glueck, that the bank knew of his interest, and that the certificates had been issued to Glueck. He also contended that in 1967 he had requested Glueck to order the bank to transfer half of the shares into Haas' name, and that Glueck had in turn instructed the bank to do so. Jefferson Bank responded that it had refused the transfer because Glueck was indebted to it and, by the terms of the promissory note, was required to transfer to it all property he owned which came into the bank's possession.

The bank also alleged that Glueck had withdrawn the transfer request and instead had pledged the stock certificates with a second bank as collateral for a loan there. Haas sued the bank in Federal court in Florida. Service was attempted on Glueck in Ohio, but was held not effective because he was beyond the territorial limits of the district court (and thus also of the State courts) in Florida. Glueck was held to be an indispensable party to the litigation, and the action was therefore dismissed.¹ Though the opinion does not say, it seems likely that the Jefferson Bank could not be served out of an Ohio court, and, judging by this case as well as others, it is quite probable that the bank would be an indispensable party in any litigation by Haas to rectify his affairs with Glueck.

It thus seems likely that under our present jurisdictional structure there is no court where this lawsuit can be brought. Almost certainly there is no tribunal which can adjudicate the case fully, affording the plaintiff adequate relief on the one hand and protecting other parties against undue risk of double liability on the other. This case would fit precisely within the proposed new head of diversity jurisdiction. The lawsuit could be brought in any district where a substantial part of the events occurred (probably either Ohio or Florida in the Haas case), and Federal process would be authorized to bring in (from wherever they might be) all the defendants necessary to accomplish just adjudication of the case. Though two of the opposing parties are of the same State citizenship, there is diversity between the plaintiff and the third party which would be sufficient to found jurisdiction under the proposed statute.

Cases such as this where no court is available are, so far as we can tell, thankfully quite rare today. But for each of these there are quite a few more in which a court proceeds to an adjudication which does less than full justice. The proposed new Federal jurisdiction for dispersed party cases seeks to provide for both these categories of cases. It includes those in which an unavailable party is considered "indispensable" under relevant law—meaning that the court will not proceed at all in his absence. But it also extends to those in which a State court could proceed as to those before it, but an unreachable party is necessary for a just adjudication of the case. It thus seeks to provide a forum to do full justice whenever a State tribunal would be prevented, by the dispersion of needed parties, from achieving a just adjudication.

The suggestion has been made that an alternative way of meeting this problem might be to enact a Federal statute authorizing State

¹ *Haas v. Jefferson National Bank of Miami Beach*, 442 F. 2d 394 (5th Cir. 1971).

courts to extend their process by Federal authority beyond what would otherwise be the limits of State jurisdiction. This might be possible, but its advantages are questionable. Since it would be necessary to regulate the circumstances in which a State could exercise jurisdiction by virtue of Federal authority over persons who would be beyond the State's own reach, the resultant statutory structure would probably not be very different from that which is presently before you.

On the other hand, so long as we do not have a body of Federal choice-of-law rules binding on the States (a matter which I believe will be considered later in this morning's session), the result would be to give State judges power to decide the choice of law applicable to someone whom they could not serve—and thus apply their own law to—by their own authority. For example, in the *Haas* case, it would mean that an Ohio court would have power to make the choice of law applicable to the Florida bank, or a Florida court the rule applicable to Glueck as well as Haas. Even if these State courts were supposed to make this decision under Federal choice-of-law principles, this would present a problem. But particularly where we have no clear body of Federal choice-of-law binding on the State courts, a Federal forum seems definitely preferable.

Indeed, even in a Federal forum it is not appropriate that State choice-of-law directly govern parties whom the State could not reach by its own authority. Thus, in interpleader as well as the multi-State-multi-party jurisdiction now under discussion, it seems proper that the Federal courts should be released from the obligation imposed by *Klaxon v. Stentor* and *Griffin v. McCoach* automatically to follow State choice of law. The bill presently before you thus provides.

Perhaps I should add that in my judgment one should not view this category of dispersed-party cases as reason for abandoning the *Klaxon* rule totally and moving to a general Federal choice-of-law; whether that is desirable generally is a different matter, but doing it for the reason of these cases would indeed be wagging a large dog by a very small part of the tail. To be sure, where the State courts can handle cases like this by their own authority, it is indeed far better that they do so.

As the chairman pointed out, the number of States that are extending the long-arm jurisdiction has been increasing; I believe that tendency will continue, and I think it is generally desirable. The proposal before you accomplishes this by taking into Federal court only those cases where the parties necessary for a just adjudication are not amenable to the jurisdiction of any State court. Besides preserving State authority where it presently exists, this provision leaves the option to the States to extend their long-arm jurisdiction in whatever degree they think wise generally, and cedes all relevant cases to them to the extent that they do so. This is not unimportant. In an informal survey of recent reported Federal cases on necessary and indispensable parties, the majority by far were clearly cases where the complete litigation could easily be brought in a single State court. In those cases, Federal jurisdiction was precluded by the absence of the required diversity of citizenship.

In fact, in at least one, a case was actually pending in State court in which all the requisite parties had already been joined.

This requirement that the parties involved be unamenable to suit in a single State court thus is important. It must be admitted, however, that a specific factual inquiry into the actual amendability of each party to State process could result in burdensome threshold litigation. The bill before you avoids this: it specifically identifies certain objective criteria (such as an individual's home or a corporation's charter State) as the only elements of amendability to process which need be considered. Moreover, in all but the rarest cases the investigation of even those identified factors would be limited to only one or two jurisdictions (in no event would the number exceed that which involved the least amenable defendant).

Simplifying the administration of the provision as just indicated is accomplished by spelling out specific criteria in the proposed statute. While this may have added to the appearance of complexity in the draft, in fact it would materially simplify the work of lawyers and judges in actual litigation. This pattern is repeated generally throughout the bill. Issues are anticipated and resolved in the proposed legislation, rather than leaving them to the costly and protracted processes of litigation.

This has the disadvantage of lengthening the bill and giving it the appearance of complexity. But it seems nevertheless far the better course, as compared to leaving the individual parties the burden and expense of securing a resolution by litigation later. Actually, what seems to be complexity of language frequently turns out to be the simplest method in actual administration.

I would sum up simply by pointing out that the multi-party, multi-State diversity jurisdiction proposal presently before you seeks to make use of the Federal courts to provide for cases which no State court can handle with full justice to the parties involved. This is an appropriate use of the constitutional diversity jurisdiction. While these cases will be governed by State law, nevertheless it is the limitations of the State systems that prevent a just adjudication in their tribunals. Moreover, it is precisely the multistate—diverse citizenship—characteristic of these cases that produces that result. It is fitting, and entirely proper, that the diversity jurisdiction of the Federal courts be called into play to provide a forum for a just adjudication in those circumstances.

Senator BURDICK. Thank you very much. Without objection, your prepared statement will be entered in the record.

(The statement of Professor Mishkin follows:)

STATEMENT OF PAUL J. MISHKIN

My name is Paul J. Mishkin. I am Professor of Law at the University of Pennsylvania. I have studied, taught, and written about the jurisdiction of the federal courts and their role in our federal system, for the past 21 years. I was Reporter for the diversity of citizenship areas of the American Law Institute's Study of the Division of Jurisdiction Between State and Federal Courts, and a member of the Institute's Advisory Committee for the other portions of the Study. Since the bill before you is derived from the product of the A.L.I. Study, I am naturally in substantial agreement with it, and I am grateful for your invitation to appear before you in these hearings. I speak, of course, as an individual and not as a representative of the A.L.I. This statement will focus on the provisions of the bill which would create a new category of diversity jurisdiction to deal with cases involving multiple parties who are dispersed beyond the reach of any single state court. My friend and colleague, Mr. Richard Field, who was Chief Reporter of the whole Study, has already testified before you with

regard to the general diversity jurisdiction provisions; but since my earlier responsibilities extended to that area as well, I will be glad to try to respond to any questions you may wish to put regarding that broader subject.

The problem which this proposed new head of diversity jurisdiction seeks to meet is small in numbers, but important when it occurs. It is not that multi-party multi-state cases are rare; in these days they certainly are not. Even those where dispersed parties must be gathered in to achieve a just adjudication of the controversy are not that infrequent. It is rather that the greatest proportion of these can be fully handled by state courts, and are. Moreover, since these cases are generally governed by state law, it is entirely appropriate that they be adjudicated in state court when those courts are able to do so.

At the same time, it is not uncommon that the parties are so dispersed among several states that no single state court is able to obtain jurisdiction of all those necessary for a just adjudication of the case. The states are no longer as restricted as they once were in securing the presence of distant parties, and they have made great and effective strides to extend substantially the reach of their court process. But whether as a result of the state's failure to reach out as far as it might, or because of remaining constitutional limits on a state's jurisdictional grasp, there remain circumstances where no state court can gather to it all the parties who must be joined in order to have a just adjudication of the dispute. When that occurs, under existing law and the present judicial structure the only available alternatives are either for a state court to proceed as best it can with those parties whom it does have before it, seeking to minimize the harm to them and to the absent persons, or to dismiss the case entirely.

The federal courts are in essentially the same situation.¹ Ordinarily, in these circumstances a court with jurisdiction of some of the parties will be able to do something effective and, faced with the alternative of dismissing the plaintiff's claim entirely, will take the case and do its best. But there are cases of this kind in which the courts will dismiss, with the result that a party may be left entirely without any court to hear his claim.

Let me give as an example a case decided earlier this year. A man named Haas, a citizen of Ohio, sued the Jefferson National Bank of Miami Beach seeking an injunction requiring the bank to issue shares of its stock to him or, alternatively, money damages. Haas alleged that he had made several agreements with one Glueck, also of Ohio, for the joint purchase of Jefferson Bank stock. The certificates were to be in Glueck's name, but Haas was to retain one-half ownership. Haas alleged that he had paid the agreed money to Glueck, that the bank knew of his interest, and that the certificates had been issued to Glueck. He also contended that in 1967 he had requested Glueck to order the Bank to transfer half of the shares into Haas' name. Jefferson Bank stated that, at the time of the transfer request, Glueck was indebted to it and under the terms of a promissory note, was required to transfer to it all property he owned which came into the Bank's possession.

The Bank also alleged that Glueck had withdrawn the transfer request and instead had pledged the stock certificates with a second bank as collateral for a loan there. Haas sued the Bank in federal court in Florida. Service was attempted on Glueck in Ohio, but was held not effective because beyond the territorial limits of the district court (and thus also of the state courts) in Florida. Glueck was held to be an indispensable party to the litigation, and the action was **therefore dismissed.**² Though the opinion does not say, it seems likely that the Jefferson Bank could not be served out of an Ohio court, and, judging by this case as well as others, it is quite probable that the Bank would be an indispensable party in any litigation by Haas to rectify his affairs with Glueck.

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Cases such as this where no court is available are, so far as we can tell, thankfully quite rare today. But for each of these there are quite a few more in which a court proceeds to an adjudication which does less than full justice. The proposed new federal jurisdiction for dispersed party cases seeks to provide for both these categories of cases. It includes those in which an unavailable party is considered "indispensable" under relevant law—meaning that the court will not proceed at all in his absence. But it also extends to those in which a state court could proceed as to those before it, but an unreachable party is necessary for a just adjudication of the case. It thus seeks to provide a forum to do full justice whenever a state tribunal would be prevented, by the dispersion of needed parties, from achieving a just adjudication.

The suggestion has been made that an alternative way of meeting this problem might be to enact a federal statute authorizing state courts to extend their process by federal authority beyond what would otherwise be the limits of state jurisdiction. This might be possible, but its advantages are questionable. Since it would be necessary to regulate the circumstances in which a state could exercise jurisdiction by virtue of federal authority over persons who would be beyond the state's own reach, the resultant statutory structure would probably not be very different from that which is presently before you.

On the other hand, so long as we do not have a federal choice-of-law binding on the states (a matter which I believe will be considered later in this morning's session), the result would be to give state judges power to decide the choice of law applicable to someone whom they could not serve—and thus apply their own law to—by their own authority. For example, in the Haas case, it would mean that an Ohio court would have the power to make the choice of law applicable to the Florida bank, or a Florida court the rule applicable to Glueck as well as Haas. Even if these state courts were supposed to make this decision under federal choice-of-law principles, this would present a problem. But particularly where we have no clear body of federal choice-of-law binding on the state courts, a federal forum seems definitely preferable.

Indeed, even in a federal forum it is not appropriate that state choice of law directly govern parties whom the state could not reach by its own authority. Thus, in interpleader as well as the multi-state multi-party jurisdiction now under discussion, it seems proper that the federal courts should be released from the obligation imposed by *Klaxon v. Stentor* and *Griffin v. McCoach* automatically to follow state choice of law. The bill presently before you thus provides. Perhaps I should add that in my judgment one should not view this category of dispersed-party cases as reason for abandoning the *Klaxon* rule totally and moving to a general federal choice-of-law; whether that is desirable generally is a different matter, but doing it for the reason of these cases would indeed be wagging a large dog by a very small part of the tail.

To be sure, where the state courts can handle cases like this by their own authority, it is indeed far better that they do so. The proposal before you accomplishes this by taking into federal court only those cases where the parties necessary for a just adjudication are not amenable to the jurisdiction of any state court. Besides preserving state authority where it presently exists, this provision leaves the option to the states to extend their long-arm jurisdiction in whatever degree they think wise generally, and cedes all relevant cases to them to the extent that they do so. This is not unimportant. In any informal survey of recent reported federal cases on necessary and indispensable parties, the majority by far were clearly cases where the complete litigation could easily be brought in a single state court.³ In fact, in at least one, a case was actually pending in state court in which all the requisite parties had already been joined.

This requirement that the parties involved be unamenable to suit in a single state court thus is important. It must be admitted, however, that a specific factual inquiry into the actual amenability of each party to state process could result in burdensome threshold litigation. The bill before you avoids this: it specifically identifies certain objective criteria (such as an individual's home or a corporation's charter state) as the *only* elements of amenability to process which need be considered. Moreover, in all but the rarest cases the investigation of even those identified factors would be limited to only one or two jurisdictions (in no event would the number exceed that which involved the *least* amenable defendant.)

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Simplifying the administration of the provision as just indicated is accomplished by spelling out specific criteria in the proposed statute. While this may have added to the appearance of complexity in the draft, in fact it would materially simplify the work of lawyers and judges in actual litigation. This pattern is repeated generally throughout the bill. Issues are anticipated and resolved in the proposed legislation, rather than leaving them to the costly and protracted processes of litigation. This has the disadvantage of lengthening the bill and giving it the appearance of complexity. But it seems nevertheless far the better course, as compared to leaving to individual parties the burden and expense of securing a resolution by litigation later. Actually, what seems to be a complexity of language frequently turns out to be the simplest method in actual administration.

Let me give two other examples. The bill specifically provides that persons being sued individually shall not be deemed necessary for a just adjudication simply because liability is asserted against them jointly or alternatively as well. Under prevailing authority, such persons would not be deemed "necessary" in any event, but since there has been an occasional suggestion of a different result, it seems wise to spell this out in the statute to preclude litigating the issue at length later.

Similarly, venue of cases within the proposal is generally to be located not on the basis of parties' residence, but rather at the most probably central and convenient place for all parties, where the prior transactions had occurred. This provision might thus have read, as some statutes do now, "where the cause of action arose." This would have sounded simple. In fact, it would have left all the cases where material events occurred in more than one district—not an unusual circumstance—open to litigation to determine in each instance in which district *the* cause "arose." The formulation in the bill before you—"where a substantial part of the events or omissions giving rise to the claim occurred . . ."—sounds more complex, but actually should serve to eliminate litigation by making clear that any district with substantial material facts is a proper venue.⁴

The multi-party multi-state diversity jurisdiction proposal presently before you seeks to make use of the federal courts to provide for cases which no state court can handle with full justice to the parties involved. This is an appropriate use of the Constitutional diversity jurisdiction. While these cases will be governed by state law, nevertheless it is the limitations of the state systems that prevent a just adjudication in their tribunals. Moreover, it is precisely the multi-state—diverse citizenship—characteristic of these cases that produces that result. It is fitting, and entirely proper, that the diversity jurisdiction of the federal courts be called into play to provide a forum for a just adjudication in those circumstance.

MR. MISHKIN. If I may, either at this point or later, I would like to respond to some of Professor Pelaez' testimony that you heard earlier which was requested.

SENATOR BURDICK. We have some questions here first, then we can go into that.

Now, as you testified I have been thinking about the complex society we now live in. I fly home most weekends. The trip is roughly 1,300–1,400 miles by air. I presume I don't spend any more time in the air than the weekend salesman used to spend just traveling home within the State. And so our commercial transactions are crossing State lines now like they never did before.

It seems to me that we are going to have to adopt some rules so that these imaginary State lines aren't complete impediments to commerce and in transactions. What do you think?

MR. MISHKIN. I think there is no question that that is so. I think the problem is to define both those areas in which there ought to be Federal substantive legislation which will indeed deal with problems by meeting them in terms of policies that govern beyond State lines

⁴ Along the same lines, the bill might simply have ignored the situation where there is no such district because all the relevant events occurred outside the United States even though perhaps entirely between United States citizens). The bill before you provides for that contingency in advance. This requires a whole additional subsection of definitions, thus appearing to add to the complexity, when actually it will serve to make operation of the provision much simpler.

and regardless of State lines. We need to adopt, I think, other kinds of legislation to deal with court systems which will at the same time allow the States to regulate those things which do remain within their jurisdiction.

I think perhaps the best discussion of the kinds of considerations that get involved here was done by Judge Friendly in an article called "In Praise of Erie and of Federal Common Law." He was talking in terms of the judicial role, but he does discuss some of the considerations that go to deciding when Federal substantive law is appropriate generally.

The proposal we are dealing with here attempts to deal with those cases which are still governed by State laws, as presumably many would continue to be, but involve people in many States and thus present additional problems.

Senator BURDICK. You are constantly using the phrase indispensable and necessary parties. There are other parties, too, aren't there?

Mr. MISHKIN. Yes, indeed.

Senator BURDICK. What about the case involving joint and several liability? Would all parties in the obligation be necessary parties?

Mr. MISHKIN. Under the bill it is specifically provided that they would not be. That is generally the present state of the law and to the extent that there is any possible question the bill seeks to be explicit to avoid litigation about the issue later.

The reason for that is simply that if you once call that relationship a necessary party relationship, so that you open this jurisdiction to those cases, you have included a very large number of cases in which there isn't a need to the same degree as those covered by the bill since each of the individual defendants is being sued for the total liability involved and issues that are involved in the litigation don't necessarily affect or turn on the presence of other parties. And perhaps even more troubling if you open the jurisdiction of this category to those cases, you invite the joinder of parties who would not otherwise be sued simply to create Federal jurisdiction. You, for example, invite a plaintiff to join the driver rather than sue only the owner of the business because if he can find any diversity he gets into Federal court. This would be an incentive today for those who prefer Federal court for any one of a number of tactical reasons. If this whole bill were enacted generally, and barred access to an in-State plaintiff in his home State, it would cut diversity even further and this would increase the incentive for finding some way to get into Federal court, to try to open up the particular head of jurisdiction that we are talking about. As drafted it is quite narrow. To include the joint and several liability cases would make it a very major grant of jurisdiction and one that I think would disserve the purposes of the bill generally.

Senator BURDICK. Well suppose A living in North Dakota wants to sue X and Y who are joint signers of a promissory note to him. X lives in California, Y lives in New York. If this legislation before us becomes law, A could choose between X and Y and he would have the choice of suing X in California or Y in New York. If he sued X in California, Y would not be a necessary party. If A received a judgment, X would have to sue Y in a separate suit for contribution.

Aren't we mushrooming our lawsuits and our litigation? As long as you are getting service outside of the State of North Dakota on, say, X in California, why don't we include Y in New York in the same suit?

Mr. MISHKIN. This chapter does not increase the number of lawsuits; it simply does not reach the case you posed. A just adjudication can be obtained in a suit by A against X or Y—he can fully recover against either. This chapter reaches only those cases where a just adjudication would be prevented by the absence of a party. It is only to reach that limited type of case that this chapter is proposed.

But to return to your example. Was the note originally signed in North Dakota for business occurring in North Dakota?

Senator BURDICK. I presume so.

Mr. MISHKIN. That might then serve as a basis for long-arm jurisdiction by North Dakota.

Senator BURDICK. Let's assume that we don't have it. You admit we have about 30 States without long-arm jurisdiction.

Mr. MISHKIN. Let me say first that I think we are dealing with a relatively atypical case in the sense that ordinarily that kind of arrangement would focus somewhere where the existing long-arm jurisdiction would reach. Thirty States don't have the maximum general long arm.

Senator BURDICK. Some States have long-arm statutes limited to specific areas.

Mr. MISHKIN. Yes, sir.

Senator BURDICK. Let us assume North Dakota doesn't have a general long-arm statute at all—it does, but let's assume it doesn't. Why do we have to multiply our lawsuits?

Mr. MISHKIN. As I have explained, this chapter, the proposed sections 2371 to 2376 of title 28, does not reach every situation involving multiple parties.

The Institute chose a more narrowly drafted statute partly because the alternative then is to say that you create Federal jurisdiction in that case, and many others, in order to reach both parties.

In fact, in the case you put, ordinary general diversity will permit you to reach both X in California and Y in New York and the transfer provision might be usable to bring them both back to one Federal court and try the cases together. It wouldn't always be possible at present, because of existing limits on the transfer provision. It would be possible under the bill to transfer them both to a single district. The result would be, in the case you put—I believe they could be tried in the same place if it was in the interest of justice and for convenience of the parties and witnesses. On the other hand, there is the chance that it is not that, and simply to open the possibility of joinder is also to open some possibility of abuse.

Senator BURDICK. Well, of course, if we had general long-arm statutes in every State of the Union we wouldn't have any problems. We don't have them except in very narrow areas such as auto accident cases and the like.

Well, Professor, the view of the ALI was that the legal relationships are created today in which there is no court, State or Federal, which can adequately resolve the conflicts, but in some States, as we have said, these controversies can be reached by State long-arm statutes.

Did you consider the possibility of providing a Federal long-arm statute as a supplement to the State long-arm statutes?

Mr. MISHKIN. As I mentioned in my opening statement, we did consider that in the context of a Federal statute authorizing States to

reach beyond where they could on their own; I think your question now is broader than that. It is difficult for me to see why the Federal Government should impose upon the States generally a long arm beyond that which they wish if the purpose is simply to allow the States to carry out their own policies and enforce their own law.

I think the movement toward extending State long arm is a desirable one. The work of the commissioners on uniform State laws goes in that direction and I think we have an increasing move for the States to extend their process.

As I indicated earlier also, this head of jurisdiction that we are talking about carefully tailors itself so as to not subvert any movement in that direction by the States but indeed to encourage and respond to it.

Senator BURDICK. Do you anticipate that very many cases could be brought under this chapter in States which now have general long-arm statutes?

Mr. MISHKIN. No, sir; I don't anticipate that there would be many cases in those circumstances. I think even in the States which do not have general long arm there would not be a great number, but in those which do it would be even smaller.

Senator BURDICK. Well, then, the principal beneficiaries would be those parties that reside in States without long-arm statutes?

Mr. MISHKIN. Yes, sir.

Senator BURDICK. And in developing the multiparty provision you studied various options. First, you considered the possibility of extending jurisdiction only in cases constitutionally beyond the reach of State courts, but you rejected that approach because of the difficulty of defining or knowing what those constitutional limits are, and more important because of the gap that would be left by not reaching parties or events in States without long-arm statutes.

Is that generally correct?

Mr. MISHKIN. Yes, sir.

Senator BURDICK. You chose then to provide special jurisdiction only where State jurisdiction was insufficient to reach all defendants necessary for adjudication, not when insufficient to reach all named parties, as we said before.

Mr. MISHKIN. Yes.

Senator BURDICK. Can you give us some idea of the kinds of legal controversies, that is, in contract disputes, disputes over rights and property, and what kind of litigation would arise under this proposal?

Now, I assume that most of the long-arm statutes have some authority, particularly in tort cases involving automobile collisions. What other kinds of disputes do you think should be reached by this legislation? Give us an example.

Mr. MISHKIN. Well, just by way of relying on experience rather than my imagination, I looked at some of the recent cases to get a sampling of the kind of issues that have arisen. They involved such things as a suit to rescind a contract to which there were many parties; a suit by several insurance companies that were subrogees of a particular claim; a suit for reformation of an insurance policy in which the named tenant and the named payee were both alleged not to be the actual tenant and the actual beneficiary, and, therefore, an attempt was made to reform the contract in a suit in which one of the parties missing was the originally named payee.

Almost any of these cases with multiple interests to a commercial transaction could be a candidate for this head of jurisdiction.

Senator BURDICK. Do you think that controversy could arise over the definition of necessary parties?

Mr. MISHKIN. As a law professor I suppose I could never answer your question whether controversy might arise in the negative.

Senator BURDICK. I mean excessively.

Mr. MISHKIN. I think the proposal does its best to reduce it. It was drafted at the same time the new rule 19 was drafted and indeed the language is not accidentally parallel to rule 19. They both derive from the same source and were both drafted with an effort to reduce the amount of litigation that might be necessary.

There is, of course, existing authority and more will develop. I think that in most instances the question will not be a difficult one but there can be litigation until some line is drawn which will be administrable thereafter with relative ease. At least that is the hope.

Senator BURDICK. At least in those cases where there is clear joint and several liability, whether it is under a contract or whatever it is on, that is pretty clear, I presume?

Mr. MISHKIN. Yes.

Senator BURDICK. What I am thinking of is let's take a situation of a three-car collision between residents of three States. It would seem to me that on the basis of information available to the court at that period that they would all be necessary parties. You can't say before hand that one party is clearly negligent until it has been tried. Wouldn't a three-car collision involve necessary parties?

Mr. MISHKIN. Not by definition of the draft. Nor would they be understood to be necessary under most of the cases applying Federal rule 19. That is the plaintiff may fully recover against either party, but the second party is not necessary for the plaintiff to gain complete relief.

This does not mean that these accident cases may not be more adequately disposed of if tried together. However, every State has a long-arm statute to cover auto accidents which are the most common cases.

Senator BURDICK. Have they?

Mr. MISHKIN. Yes, sir.

Senator BURDICK. That takes care of that. So in those cases they are covered. Then we are resolving ourselves, more or less. There are other tort situations but—

Mr. MISHKIN. As you mentioned earlier, Senator, many of the long arms that are not general do focus on the tort situation.

Senator BURDICK. I am trying to think of some tort situation that wouldn't fall within the long-run statute. There must be fist fights in the barroom or something.

Mr. MISHKIN. I am sure there are.

Senator BURDICK. A could sue B and B said, "I didn't hit the guy, C did."

Mr. MISHKIN. I am sure those exist in States that don't have general long-arm statutes. It might indeed be a problem. I think the appropriate way to solve that is for the States to have wider long-arm statutes that would cover more of these cases, draw them into their courts and dispose of them. I think the fist fights belong in the State courts.

Senator BURDICK. You say the bulk of the cases that come under this legislation would be those involving contracts.

Mr. MISHKIN. Yes, sir.

Senator BURDICK. Section 2371 allows the resident plaintiff to bring an action, contrary to the proposals for general diversity jurisdiction. Why is there this difference?

Mr. MISHKIN. Because in these multiparty cases the problem is one which the State courts almost by definition of the statute can't adequately handle, and, as I just indicated, that was precisely the thrust which the statute was intended to have. Those which are appropriate for the State courts ought to be left there.

If you are then dealing with those cases and bringing them into Federal court because no State court can handle them, there is no reason not to allow the plaintiff to bring it in his home State if that is an appropriate venue. The reason for denying that in general diversity is because the purpose of general diversity is to protect an individual when he is in another State; it doesn't apply when an individual is in his home State. The purpose of this provision is to provide a forum where no State can provide a fully adequate forum; this purpose does not demand that barrier against the in-State plaintiff and indeed would be better served if the litigation could be brought in whatever State the events had occurred in, which is where the venue is placed.

Senator BURDICK. That is only because A, if he brought an action in the State court, couldn't reach the necessary parties to that procedure. That is really the reason, isn't it?

Mr. MISHKIN. Yes, sir.

Senator BURDICK. And so it doesn't change the concept of generally having an in-State plaintiff bring the action in the State court?

Mr. MISHKIN. That is correct. The reason he is allowed to use a Federal court here is because the State court can't really dispose of the litigation well. In general diversity there is no reason to allow him to go to the Federal court.

Senator BURDICK. Suppose a corporation is a necessary party; it is amenable to suit along with all of the necessary parties in a jurisdiction where it has a local establishment under section 1302 of the bill. Then what is the effect of section 2371(c) (2) which limits the corporation to the State of the charter of its principal office?

Mr. MISHKIN. Section 2371(c) (2) deals with a very specific question only. As you recall, in my statement I referred to the effort to simplify the determination of who could not be served out of a State court. If the formula was simply left that when the parties could not be served out of a single State court this jurisdictional heading would come into play, that would require an investigation of a factual matter. As to individuals, for example, was he present in the State; as to a corporation, where are they doing business—under a formula which varies from State to State, and with no consistency. To simplify that inquiry and make it relatively easy to administer, section 2371(c) makes some arbitrary definitions; (c) (2) limits the inquiry as to a corporation only to where it is incorporated or has its principal office. On that basis, if you have made that inquiry, you have inquired under (3) whether it had an agent in the jurisdiction to receive process—which it would have if it registered to do business; and under (4),

whether it was reached by the State long-arm statute, you would not have to inquire as a matter of fact whether it was doing business. That is the only purpose of section 2371(c)(2) and it would have no connection with the normal definition of local establishment.

Senator BURDICK. Section 2372 provides venue only in districts that have significant contact with the subject matter of the suit or where substantial events occurred or the property that is the subject matter of the suit is located. Can you explain the basis for that?

Mr. MISHKIN. Perhaps the easiest example would be to return to your example of a transaction which occurred in North Dakota, but involved necessary parties as defined in the bill, elsewhere, beyond the reach of the State process.

If indeed the events occurred in North Dakota, then the likeliest center for these scattered parties is back in North Dakota where the original deal took place. The venue provision aims at that. It seeks primarily to start the litigation in the place where it is at least more likely than any other single place that all of the parties had some relationship. That is the reason for the definition.

In those cases where that initial venue proves in fact not to be a good focus for the litigation, the provision for transfer would apply and the case could then be sent to the appropriate district.

Senator BURDICK. Section 2373 allows removal from a State court by a defendant when parties necessary for a just adjudication as to a defendant are absent beyond his effective reach, as long as there is minimum diversity. This is generally the converse of section 2371. Is that right?

Mr. MISHKIN. Yes, sir; the focus at this point is in terms of a defendant who is sued in a State court seeking to avoid a judgment which will be harmful to him and not protect him because some other party is missing, the focus is on his ability to remove the action to the Federal court, whereas in the original jurisdiction the focus is wider, it is in terms of whether the litigation itself has been framed in a way which provides for a just adjudication. It is the converse in that sense.

Senator BURDICK. Section 2373(e) covers cases where a plaintiff has sued in an inappropriate State court providing the Federal court may stay the proceedings. Can you explain this subsection?

Mr. MISHKIN. Its purpose is principally to take care of the occasional case in which the litigation is started in a State court that is really inappropriate, in which there was an appropriate State court and still is available an appropriate State court that could handle it perfectly well, and the only reason the incompleteness exists is because it was in the wrong State; this is simply a device which lets the Federal court seize that situation and provide that it be brought in the right State.

Senator BURDICK. In other words, a case brought in State X, that there is no property there, the parties weren't there and nothing there.

Mr. MISHKIN. They managed to get service on somebody.

Senator BURDICK. You shouldn't stay there.

Mr. MISHKIN. It is essentially a transfer device, although it is not called that, to another State court which can handle it.

Senator BURDICK. Why are the transfer provisions in section 2374 (b) instead of the venue section?

Mr. MISHKIN. In part to make clear that the transfer applies to cases that have been removed as well as original cases. The venue section by its terms only controls where an original lawsuit can be brought. Removal is always to the Federal court in the State where the State action occurred. The transfer provision applies to both, so it was separated out.

Senator BURDICK. What are the transfer policies contained in section 2374(b)?

Mr. MISHKIN. Essentially that the widest discretion be given to the Federal court to decide where the case should be tried in the interest of justice and for the convenience of parties and witnesses. The district judge then may transfer to any other district; hopefully, it would be the one in which the witnesses are most available, in which the parties have current contact. In short, where he thinks that it ought to be tried. The plaintiff gets the first option of selection and section 2374(b) gives the district judge the chance to second-guess him when he has the facts.

Senator BURDICK. Your statement you made a few moments ago was appropriate, the place of trial was where all parties had a piece of it or had a part of it.

Mr. MISHKIN. The bill tries to accomplish precisely that both in terms of what it provides for original venue and then by this device in the case where the plaintiff chose some less appropriate place.

Senator BURDICK. Section 2375(e) contains an important definition of a fully effective judgment relating to actions in rem or quasi-in-rem. Can you explain it?

Mr. MISHKIN. This returns once again to the basic principle that we are dealing with cases where the States can't get all the necessary parties into a single State court and the effort here is to define what we mean by get a party into a State court in that sense I just used.

The definition says essentially if a State court can render an effective judgment against someone's property to the extent needed to handle the lawsuit, that is all that is required to consider that the State court can gather that party in. This is again a description or definition which increases the likelihood that these cases will be handled in the State court when the State courts are able to do the job effectively.

Senator BURDICK. Would it be feasible to have joint and several liability definition of a necessary party apply only to joint tort feasons?

Mr. MISHKIN. It would be possible. I think the normal effect of the present provision will be principally in that area as we said earlier. It is difficult to justify a rule, a principle which handles tort liability differently from contract liability, and it is difficult in practice when you begin to get cases like warranty cases on products liability to decide whether they are tort or contract and on which side of the line you try to put them. I think the effort to move in that direction would not be justified, though it would be possible.

Senator BURDICK. Perhaps, as you said a while ago, the bulk of the cases are covered now by long-arm statutes—tort cases arising out of automobile cases.

Mr. MISHKIN. I think so, yes.

Senator BURDICK. Well, you have been very helpful this morning and I think this is a good time to relieve you from the stand. There is a vote going on in the Senate right now and I will have to have a few

minutes recess. I will be gone just 10 minutes or so. So we will be in recess for 10 minutes.

(Whereupon a recess was taken from 11 a.m. until 11:30 a.m.)

Senator BURDICK. We agreed you should have a chance to comment on Professor Pelaez' testimony.

Mr. MISHKIN. You may recall, sir, that Professor Pelaez used as examples two cases which he felt would not come out properly under the proposed bill. I might say in general that I think they are relatively marginal cases and even if they didn't come out right it wouldn't necessarily make the case against the proposal. But I think they actually turn out quite well under the bill.

The first example he used was a Pennsylvania accident. A Pennsylvania truckdriver had an accident with a car containing a Connecticut driver and a passenger; the essence of the problem was that Pennsylvania has some rather odd evidence rules.

Senator BURDICK. This has to do with dead man's statute?

Mr. MISHKIN. Yes, sir. I have almost no expertise in evidence at all but what little I know does not lead me to favor the dead man's rule in Pennsylvania; the dying declaration rule, I think, is questionable. Those are the two it turns on.

If you recall, his point was that under the bill the Pennsylvania driver could go to a Connecticut Federal court which would then not apply the Pennsylvania law and, therefore, he might be able to recover there when he could not in the Pennsylvania courts. The argument was that as a result, if he was wealthy enough, this bill would let him go to Federal court in Connecticut and escape the Pennsylvania court, but would bar him from Federal courts in Pennsylvania.

The essence of it, that I think is ignored, is that if you had no Federal Courts the wealthy plaintiffs could still go to Connecticut. He could go to the Connecticut State court and escape the Pennsylvania rule. In fact, the only reason the bill would permit him to go to a Connecticut Federal court is because he could go to a Connecticut State court. The bill's premise is if he could go (or, indeed, might even have to go) to a Connecticut State court and he is an out-of-stater there, then the diversity of citizenship gives him access to the Federal court. But the argument which is made from that fact, that because he could sue in the Connecticut State court and escape the effect of the Pennsylvania rules that we therefore ought to allow him to escape them by suing in the Federal court in his home State, doesn't seem to follow.

In fact, if you analyze it, it is a suggestion that a man should be able to escape the rules of his home State when he happens to have an opponent who is from another State, but not when he has an opponent from his own State.

The second example that Professor Pelaez used to make another point was the suit involving a United States Steel mine in Wyoming, a supplier of goods in Wyoming, and a question about the quality of the goods. The case put was that United States Steel would bring suit in State court in Pennsylvania and that the supplier would remove to Federal court; the concern was that under the bill the Federal court in Pennsylvania could not transfer it to the Federal court in Wyoming. There is a provision which says, and which Professor Pelaez noted, that the Federal court in Pennsylvania in that circumstance could

simply refuse to proceed and force the case to be brought in an appropriate State court. He assumes in his statement that would have to be Pennsylvania, but it is not. The appropriate place for the lawsuit obviously is a Wyoming State court. It involves a Wyoming supplier to a Wyoming mine. The effect of the stay provision would be that the Federal court in Pennsylvania would simply stay its proceedings and require the lawsuit to be brought in the Wyoming State court where it should have been in the first place. Hopefully if this is part of the law, United States Steel, knowing this was going to happen in the first place, would have started the lawsuit where it belonged, in the Wyoming State court, and the whole thing would have been avoided.

Senator BURDICK. I think you have very adequately distinguished those two examples.

Mr. MISHKIN. I think in general the essence of it simply is that there really isn't much reason to allow an individual to avoid his own State court, even if it is not the most advantageous, when he has an opponent from out of State but not when he has an opponent from in State.

Senator BURDICK. I understand. Thank you very much.

Our next witness is Prof. David Cavers. Professor Cavers is a Fessenden professor emeritus at the Harvard Law School. He has written numerous articles on the conflict-of-law question. He delivered the Cooley lectures at the University of Michigan Law School in 1964, which were later published in a notable book, entitled "The Choice of Law Process." Professor Cavers served as a consultant on choice of law questions to the ALI Advisory Committee on the study of jurisdiction of Federal courts.

It is a pleasure to welcome you, Professor, and you may proceed.

STATEMENT OF DAVID F. CAVERS, FESSENDEN PROFESSOR EMERITUS, LAW SCHOOL, HARVARD UNIVERSITY

Mr. CAVERS. Thank you very much. It is an honor to be here. I shall address myself first to the question whether the general rule of the *Klaxon* case (*Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941)) should be preserved—the rule that Professor Mishkin properly identified as the large dog—before I deal with the several exceptions to that rule that the Institute is proposing. Those are the small parts of the tail.

Let me first state, however, that in my opinion the proposed exceptions are desirable and basically compatible with the *Klaxon* rule. That rule, I submit, should be preserved as modified.

The Supreme Court in the *Klaxon* case did not explicitly declare its decision to be a constitutional ruling, although it cited and relied on *Erie Railroad v. Tompkins* (304 U.S. 64 (1938)), a constitutional decision. However, I do not consider the *Klaxon* rule required by the constitution. Surely Congress has constitutional power to set up a system of Federal courts in complete disregard of State lines. In such a system, though *Erie* would still compel State substantive laws to be applied, choices by Federal courts among those laws would not have to be governed by the choice-of-law rules of the States in which they happened to be sitting. The forum in such cases would not be tied to a particular State.

I need scarcely say that this is not the Federal court system that the first Congress created and that has persisted for 182 years. On the contrary, our Federal courts have been fitted into the territorial and judicial systems of the States in which they sit and are restricted, with few exceptions, to the process available to the State courts. In the light of this effort, reinforced by *Erie*, to harmonize the operation of the two systems of courts, I submit that the *Klaxon* court was very wise not to jeopardize "equal administration of justice in coordinate State and Federal courts sitting side by side" by doing "violence to the principle of uniformity within a State * * *"

In *Klaxon*, Mr. Justice Reed also took note of the freedom that the Supreme Court had given to the State, "to pursue local policies diverging from those of its neighbors." He then added, "it is not for the Federal courts to thwart such policies by enforcing an independent 'general law' of conflict of laws." To be sure, in a Federal system no State can effectuate all its local policies because it cannot control the conflicting policies of other States. However, the existing system usually gives to each State an opportunity to decide which of its policies merit application in situations that are not wholly domestic. Sometimes, its own courts will conclude that the conflicting policy of another State should be preferred to its own as the Supreme Court of Pennsylvania has recently done in a case arising out of a Delaware accident, *Cipolla v. Shaposka*. Sometimes a State's decision to apply its own law will run counter to a choice made by another State and each will be able to prevail only when it has obtained jurisdiction. The fact that perfect autonomy cannot be assured does not argue for the surrender of all power to delimit local policy. In the course of time, moreover, a process of accommodation may develop that will minimize those costs of conflict that federalism sometimes exacts.

The question may be asked whether, as an interpretation of the Rules of Decision Act, *Klaxon* is correct. Legal historians differ. Looking at one body of evidence, Professor Baxter of Stanford concluded that the *Klaxon* court erred. Looking at other sources, nearly 20 years before *Klaxon*, the distinguished historian of the Federal Judiciary Act, Charles Warren, reached conclusions that would sustain the *Klaxon* court. I am inclined to agree with Warren, but the problems presented by *Klaxon* today ought not to be resolved by efforts to reconstruct the thinking of the First Congress.

The problem, I submit, should be decided in the light of the practical consequences that would follow from the repeal of *Klaxon* by, say, an amendment to the Rules of Decision Act. Let us assume that the Congress made it plain that Federal courts in diversity cases were free to reach their own choice-of-law decisions. Would they attain the ideal invoked by critics of *Klaxon* and prove wise umpires, achieving an orderly allocation of law-making power among the States? Or would they be exploited by forum shoppers and, while seeking to dictate the reach of State policies, confound the confusion they are supposed to dispel?

Before attempting an answer to these questions, I should note the far-reaching changes in the choice-of-law process that we are now experiencing. It has created uncertainties in that body of law—or perhaps I should say new uncertainties since the degree of certainty achieved by the dogmatic first Conflicts Restatement is at least open

to question. In any event, today we see some States developing a new methodology of choice of law and applying it to most of their cases presenting such choices. Other States have proceeded in a more gingerly fashion, limiting their innovations to particular cases or causes. Still others have flatly resisted the trend.

Such evidence as we have suggests that the Federal courts are also groping for solutions, though the innovating State courts have the blessing of the Supreme Court, conveyed by a significant footnote in *Richards v. United States*. Of course, a State court in a choice-of-law case is prevented by the Constitution from asserting the applicability of its own or another State's policy if the State whose policy it would apply has no significant interest to be advanced by that application of its law and if another State with a conflicting law has such an interest.

In the present situation, if the Federal courts were allowed to disregard State choice-of-law decisions that they found unsatisfactory, litigants in diversity cases would at once be free to exploit the prevailing uncertain state of State law, regardless of the direction in which a particular State court had been moving. Thus, decisions in the States that had adopted the new look in choice of law could be assailed as a source of uncertainty and incompatible with a nationwide system of Federal rules. States in the second two categories would find their decisions open to attack as not responsive to a policy-oriented approach to choice of law which its protagonists would attribute to the Federal courts.

Note that the power of a Federal court to thwart a State's interest would not be restrained by the fact that application of State law was expressly required by a State statute. The view of a Federal district judge adverse to the application of such a State statute would control even though its application would be viewed by the Supreme Court as a fully constitutional exercise of State power. The choice-of-law power repressed by *Klaxon* is not simply a power to exercise freedom in interpreting State common-law decisions. It is a power to make an independent Federal choice, overriding any State law to the contrary.

Klaxon is accused of enabling plaintiffs to shop for favorable forums among the States. Of course, this is theoretically possible, and doubtless it is done where the stakes are high and the alternatives evident. However, the ease of forum-shopping after a repeal of *Klaxon* would be far greater. The attractive Federal forum would be in the same State and often in the same city as that in which the forum-shopping lawyer was in practice. He would be on familiar ground. Moreover, he need not show that a favorable Federal rule conflicted with an unfavorable State rule in order to make the selection of a Federal forum a good tactical move. For the move to pay off, it would be enough for him to show that the Federal courts choice of law might be favorable and thereby improve the prospects for a satisfactory settlement. To demonstrate uncertainty, he could search the country over for precedents.

Senator BURDICK. Would you mind suspending for 2 minutes. There is a vote on the floor.

(A short recess was taken.)

Senator BURDICK. All right.

Mr. CAVERS. A case from the Fifth Circuit or one from the northern district of California might turn the trick. Moreover, even if the court

of appeals in his own circuit had spoken favorably, he still might undermine its resolution by showing a trend to the contrary in other circuits. In assessing the chance of attaining a coherent body of choice-of-law rules among the 11 circuit courts and 89 district courts, one must remember that the Supreme Court would not be riding herd. It has more important things to do.

A further risk of doctrinal chaos is to be found in the character of the emerging choice-of-law rules. As an earlycomer to the revolt against the first Restatement, I have long advocated greater flexibility in the choice-of-law process, emphasizing the relevance of the purposes of the substantive rules between which choices have to be made. However, a few years ago, troubled by the atomistic tendencies that seemed to me to be developing, I urged the adoption of a relatively simple system of principles which would reflect preferences for certain solutions. I was thereupon labeled a counterrevolutionary, and my principles have made little progress to date. A serious consequence of the present trend is that it forces precedents to be narrow. As a result, a limited change in the facts or laws involved in a new case means that prior cases are distinguishable. In view of this, a new body of Federal case law on choice of law might develop in the manner of a coral reef rather than, say, an interstate highway system.

If *Klaxon* is preserved, change in choice-of-law rules in the State courts will doubtless proceed at an uneven pace. The fact that the rates of change differ means that in some States a reasonably functional and stable body of choice-of-law rules will be achieved while the laws of other States are still in flux or even in retreat. Despite this, *Klaxon* can protect us from confusion and uncertainty on a nationwide scale, and, in the course of time, we may attain a desirable degree of uniformity without having to impose a legislative strait-jacket on resisting States.

Given this prospect, why should the ALI propose any departures from *Klaxon*? The multiparty, multi-State procedure it has devised is doubtless the most consequential of these departures, even though it is permissive and not mandatory. That section, section 2371, involves a more important innovation than simply its deviation from *Klaxon*. It permits the Federal court to depart from its traditional role as a tribunal coordinate with the State courts.

Senator BURDICK. I suppose we have a hiatus and we will break and have to go over and vote and come back. That is all I can do. We will recess for a few minutes.

(A short recess was taken from 11:50 a.m. until 12:10 p.m.)

Senator BURDICK. I hope we will have a space of time between now and the next vote.

Mr. CAVERS. In order to achieve justice in the special situations to which it applies, section 2371 endows the Federal courts with authority to bring before them parties beyond the reach of the State courts' process. Once that is done, the compulsion to preserve uniformity of action between State and Federal courts is gone. The Federal court is not, as it were, competing for the State court's customers. It is offering a distinctive service of its own for which a different choice-of-law rule may be appropriate.

This, I admit, is easiest to envisage when the question at issue involves the out-of-stater who is brought into the suit by Federal process.

However, subsection 2374(c) permits the court to make its own choice without references to whether the issue subject to that choice involves the out-of-stater as distinguished from the original parties to the case. If the latter are the persons concerned, why should they not be subject to the forum State's choice-of-law rules?

In their commentary, the draftsmen indicate their belief that the Federal forum would ordinarily apply the forum State's rules to such an issue. However, they cannot foresee all the situations that may arise, and they fear that to prescribe adherence to *Klaxon* might yield unsatisfactory results where in-State and out-of-State parties were entangled in the same issues and separation would not be practicable. Rather than attempt to anticipate all the situations and to draw lines among them, the draftsmen have wisely left the problem to the courts. In view of the spread of State long-arm statutes, subsection 2374(c) cases should not be numerous.

The next departure from *Klaxon* on which I shall comment is achieved by subsection 2363(c) governing interpleader cases. It provides that a Federal district court may determine for itself which State rule is applicable when interpleader involves more than one State. This provision would repeal *Griffin v. McCoach*, 313 U.S. 498 (1941), a case contemporary with *Klaxon*, requiring the Federal interpleader court to apply the forum State's choice-of-law rule. However, the same considerations that would justify recourse to the Federal court's rule in the multiparty, multi-State suit are also operative in the case of Federal interpleader. A like solution is called for. I note again that the bill's provision for this purpose is couched in permissive terms.

In the case of transfers under section 1305, initiated by the defendant, *Klaxon* is adhered to, and compliance with the choice-of-law rule of the original forum is required by subsection (c). This seems correct. The forum chosen by the plaintiff is legally valid, if inconvenient; the defendant was subject to that State's ordinary process. Neither party seems in a position to complain of the conclusion reached by the Supreme Court in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), that the original forum's rule be adhered to. However, where it is the plaintiff who finds his own original choice of forum inconvenient or mistaken and seeks to change it, his unsatisfactory first choice should not offer him the possibility of a bonus in the form of an advantageous choice-of-law rule upon transfer. The provision in subsection 1306(c) prescribing the choice-of-law rule of the new forum seems correct.

No doubt there are other opportunities for legislative change that would open up different opportunities and problems than those one may anticipate if the bill were enacted in its present form. I have not attempted to suggest these in my testimony, but I shall be glad to consider any that may be posed by questions. I believe it possible also that the tendency of *Klaxon* to freeze remnants of what has been termed the ice age of conflicts could be modified if Federal courts in diversity cases were to become somewhat bolder in their readings of State choice-of-law decisions. These sometimes suggest change in the choice-of-law process before it has been fully effected. I suspect, however, that our greatest hope for achieving greater uniformity among the States is through legislation directed not to choice-of-law but to substantive rules. The Uniform Commercial Code has, I believe, done

more to eliminate choice-of-law questions in its diverse fields than could any reformulation of the rules of conflict of laws.

Thank you.

Senator BURDICK. Thank you very much for your contribution this morning. Without objection your prepared statement will be entered in the record at this point.

(The statement of Professor Cavers follows:)

STATEMENT OF DAVID F. CAVERS

My name is David F. Cavers. I am Fessenden Professor Emeritus in the Law School of Harvard University and also President of the Council on Law-Related Studies, a small, private foundation engaged in the support and conduct of research relating to selected legal problems. One of my chief fields of teaching and scholarly work has been the Conflict of Laws, a subject upon which I have published two book-length sets of lectures and about a dozen articles. I served as consultant to the American Law Institute on the subject of my testimony today, namely, the question whether the position of the United States Supreme Court in *Klaxon Co. v. Stentor Electric Co.*, 313 U.S. 487 (1949), that federal courts exercising diversity jurisdiction should apply the choice-of-law rules of the States in which they sit should be retained, modified, or rejected in a revision of the rules governing diversity jurisdiction. My views on that subject were published as a supplement to Tentative Draft No. 1 of the ALI report and somewhat elaborated later in an article in 28 *Law & Contemporary Problems*.¹

I shall address myself to the question whether the general rule of the *Klaxon* case should be preserved before I deal with the several exceptions to that rule that the Institute is proposing. Let me first state, however, that in my opinion the proposed exceptions are desirable and basically compatible with the *Klaxon* rule. That rule, I submit, should be preserved as modified.

The Supreme Court in the *Klaxon* case did not explicitly declare its decision to be a constitutional ruling, although it cited and relied on *Erie Railroad v. Tompkins*, a constitutional decision. However, I do not consider the *Klaxon* rule required by the constitution. Surely Congress has constitutional power to set up a system of federal courts in complete disregard of state lines. In such a system, though *Erie* would still compel state substantive laws to be applied, choices by federal courts among those laws would not have to be governed by the choice-of-law rules of the states in which they happened to be sitting.

I need scarcely say that this is not the federal court system that the first Congress created and that has persisted for 182 years. On the contrary, our federal courts have been fitted into the territorial and judicial systems of the states in which they sit and are restricted, with few exceptions, to the process available to the state courts. In the light of this effort, reinforced by *Erie*, to harmonize the operation of the two systems of courts, I submit that the *Klaxon* court was very wise not to jeopardize "equal administration of justice in coordinate state and federal courts sitting side by side" by doing "violence to the principle of uniformity within a state . . ."

In *Klaxon*, Mr. Justice Reed also took note of the freedom that the Supreme Court had given to the state, "to pursue local policies diverging from those of its neighbors." He then added, "it is not for the Federal Courts to thwart such policies by enforcing independent 'general law' of conflict of laws." To be sure, in a federal system no state can effectuate all its local policies because it cannot control the conflicting policies of other states. However, the existing system usually gives to each state an opportunity to decide which of its policies merit application in situations that are not wholly domestic. Sometimes, its own courts will conclude that the conflicting policy of another state should be preferred to its own as the Supreme Court of Pennsylvania has recently done in a case arising out of a Delaware accident.² Sometimes a state's decision to apply its own law will run counter to a choice made by another state and each will be able to prevail only when it has obtained jurisdiction. The fact that perfect autonomy cannot be assured does not argue for the surrender of all power to delimit local policy. In the course of time, moreover, a process of accommodation may develop that will minimize those costs of conflict that federalism sometimes exacts.

¹ Cavers, The Changing Choice-of-Law Process and the Federal Courts, 28 *L. & Contemp. Prob.* 732 (1963).

² *Cipolla v. Shaposka*, 439 Pa. 563, 267 A. 2d 854 (1970), discussed in Cavers, *Cipolla* and Conflicts Justice 9, *Duquesne L. Rev.* 360 (1971).

The question may be asked whether, as an interpretation of the Rules of Decision Act, *Klaxon* is correct. Legal historians differ. Looking at one body of evidence, Professor Baxter of Stanford concluded that the *Klaxon* court erred. Looking at other sources, nearly twenty years before *Klaxon*, the distinguished historian of the Federal Judiciary Act, Charles Warren, reached conclusions that would sustain the *Klaxon* court. I am inclined to agree with Warren, but the problems presented by *Klaxon* today ought not to be resolved by efforts to reconstruct the thinking of the first Congress.

The problem, I submit, should be decided in the light of the practical consequences that would follow from the repeal of *Klaxon* by, say, an amendment to the Rules of Decision Act. Let us assume that the Congress made it plain that federal courts in diversity cases were free to reach their own choice-of-law decisions. Would they attain the ideal invoked by critics of *Klaxon* and prove wise umpires, achieving an orderly allocation of law-making power among states? Or would they be exploited by forum shoppers and, while seeking to dictate the reach of state policies, confound the confusion they are supposed to dispel?

Before attempting an answer to these questions, I should note the far-reaching changes in the choice-of-law process that we are now experiencing. It has created uncertainties in that body of law—or perhaps I should say *new* uncertainties since the degree of certainty achieved by the dogmatic first *Conflicts Restatement* is at least open to question. In any event, today we see some states developing a new methodology of choice of law and applying it to most of their cases presenting such choices. Other states have proceeded in a more gingerly fashion, limiting their innovations to particular cases or causes. Still others have flatly resisted the trend.

Such evidence as we have suggests that the federal courts are also groping for solutions, though the innovating state courts have the blessing of the Supreme Court, conveyed by a significant footnote in *Richards v. United States*.³ Of course, a state court in a choice-of-law case is prevented by the Constitution from asserting the applicability of its own or another state's policy if the state whose policy it would apply has no significant interest to be advanced by that application of its law and if another state with a conflicting law has such an interest.

In the present situation, if the federal courts were allowed to disregard state choice-of-law decisions that they found unsatisfactory, litigants in diversity cases would at once be free to exploit the prevailing uncertain state of state law, regardless of the direction in which a particular state court had been moving. Thus, decisions in the states that had adopted the new look in choice of law could be assailed as a source of uncertainty and incompatible with a nationwide system of federal rules. States in the second two categories would find their decisions open to attack as not responsive to a policy-oriented approach to choice of law which its protagonists would attribute to the federal courts.

Note that the power of a federal court to thwart a state's interest would not by restrained by the fact that application of state law was expressly required by a state statute. The view of a Federal District Judge adverse to the application of such a state statute would control even though its application would be viewed by the Supreme Court as a fully constitutional exercise of state power. The choice-of-law power repressed by *Klaxon* is not simply a power to exercise freedom in interpreting state common-law decisions. It is a power to make an independent federal choice, overriding any state law to the contrary.

Klaxon is accused of enabling plaintiffs to shop for favorable forums among the states. Of course, this is theoretically possible, and doubtless it is done where the stakes are high and the alternatives evident. However, the ease of forum-shopping after a repeal of *Klaxon* would be far greater. The attractive federal forum would be in the same state and often in the same city as that in which the forum-shopping lawyer was in practice. He would be on familiar ground. Moreover, he need not show that a favorable federal rule conflicted with an unfavorable state rule in order to make the selection of a federal forum a good tactical move. For the move to pay off, it would be enough for him to show that the federal courts choice of law *might* be favorable and thereby improve the prospects for a satisfactory settlement. To demonstrate uncertainty, he could search the country over for precedents. A case from the Fifth Circuit or one from the Northern District of California might turn the trick. Moreover, even if the Court of Appeals in his own circuit had spoken unfavorably, he still might undermine its resolution by showing a trend to the contrary in other circuits. In assessing the chance of attaining a coherent body of choice-of-law

³ 369 U.S. 1, 15 (1962).

rules among the eleven circuit courts and 89 district courts, one must remember that the Supreme Court would not be riding herd. It has more important things to do.

A further risk of doctrinal chaos is to be found in the character of the emerging choice-of-law rules. As an early-comer to the revolt against the first *Restatement*, I have long advocated greater flexibility in the choice-of-law process, emphasizing the relevance of the purposes of the substantive rules between which choices have to be made. However, a few years ago, troubled by the atomistic tendencies that seemed to me to be developing, I urged the adoption of a relatively simple system of principles which would reflect preferences for certain solutions. I was thereupon labeled a counter-revolutionary, and my principles have made little progress to date. A serious consequence of the present trend is that it forces precedents to be narrow. As a result, a limited change in the facts or laws involved in a new case means that prior cases are distinguishable. In view of this, a new body of federal case law on choice-of-law might develop in the manner of a coral reef rather than, say, an interstate highway system.

If *Klaxon* is preserved, change in choice-of-law rules in the state courts will doubtless proceed at an uneven pace. The fact that the rates of change differ means that in some states a reasonably functional and stable body of choice-of-law rules will be achieved while the laws of other states are still in flux or even in retreat. Despite this, *Klaxon* can protect us from confusion and uncertainty on a nationwide scale, and, in the course of time, we may attain a desirable degree of uniformity without having to impose a legislative straitjacket on resisting states.

Given this prospect, why should the ALI propose any departures from *Klaxon*? The multiparty, multistate procedure it has devised is doubtless the most consequential of these departures, even though it is permission and not mandatory. That section, § 2371, involves a more important innovation than simply its deviation from *Klaxon*. It permits the federal court to depart from its traditional role as a tribunal coordinate with the state courts. In order to achieve justice in the special situations to which it applies, § 2371 endows the federal courts with authority to bring before them parties beyond the reach of the state courts' process. Once that is done, the compulsion to preserve uniformity of action between state and federal courts is gone. The federal court is not, as it were, competing for the state court's customers. It is offering a distinctive service of its own for which a different choice-of-law rule may be appropriate.

This, I admit, is easiest to envisage when the question at issue involves the out-of-stater who is brought into the suit by federal process. However, § 2374(c) permits the court to make its own choice without reference to whether the issue subject to that choice involves the out-of-stater as distinguished from the original parties to the case. If the latter are the persons concerned, why should they not be subject to the forum state's choice-of-law rules?

In their commentary, the draftsmen indicate their belief that the federal forum would ordinarily apply the forum state's rules to such an issue. However, they cannot foresee all the situations that may arise, and they fear that to prescribe adherence to *Klaxon* might yield unsatisfactory results where in-state and out-of-state parties were entangled in the same issues and separation would not be practicable. Rather than attempt to anticipate all the situations and to draw lines among them, the draftsmen have wisely left the problem to the courts. In view of the spread of state long-arm statutes, § 2374 cases should not be numerous.

The next departure from *Klaxon* on which I shall comment is achieved by § 2363(c) governing interpleader cases. It provides that a federal district court may determine for itself which state rule is applicable when interpleader involves more than one state. This provision would repeal *Griffin v. McCoach*⁴ a case contemporary with *Klaxon*, requiring the federal interpleader court to apply the forum state's choice-of-law rule. However, the same considerations that would justify recourse to the federal court's rule in the multi-party, multi-state suit are also operative in the case of federal interpleader. A like solution is called for. I note again that the bill's provision for this purpose is couched in permissive terms.

In the case of transfers under § 1305, initiated by the defendant, *Klaxon* is adhered to, and compliance with the choice-of-law rule of the original forum is required by subsection (c). This seems correct. The forum chosen by the plaintiff is legally valid, if inconvenient; the defendant was subject to that state's ordinary process. Neither party seems in a position to complain of the conclusion reached by the Supreme Court in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), that

⁴ 313 U.S. 498 (1941).

the original forum's rule be adhered to. However, where it is the plaintiff who finds his own original choice of forum inconvenient or mistaken and seeks to change it, his unsatisfactory first choice should not offer him the possibility of a bonus in the form of an advantageous choice-of-law rule upon transfer. The provision in § 1306(c) prescribing the choice-of-law rule of the new forum seems correct.

No doubt there are other opportunities for legislative change that would open up different opportunities and problems than those one may anticipate if the bill were enacted in its present form. I have not attempted to suggest these in my testimony, but I shall be glad to consider any that may be posed by questions. I believe it possible also that the tendency of *Klaxon* to freeze remnants of what has been termed the Ice Age of Conflicts could be modified if federal courts in diversity cases were to become somewhat bolder in their readings of state choice-of-law decisions. These sometimes suggest change in the choice-of-law process before it has been fully effected. I suspect, however, that our greatest hope for achieving greater uniformity among the states is through legislation directed not to choice-of-law but to substantive rules. The Uniform Commercial Code has, I believe, done more to eliminate choice-of-law questions in its diverse fields than could any reformulation of the rules of conflict of laws.

Professor Cavers, before reaching the proposal for independent choice-of-law rules for multiparty cases you first reached a conclusion that such rules would be constitutional. Is that right?

Mr. CAVERS. Yes, sir, Mr. Chairman.

Senator BURDICK. What factors do you feel justify or strongly compel a Federal choice of law rule in these multiparty cases?

Mr. CAVERS. The factor that seems to me to justify such a Federal choice of rule is the circumstance that, in such a case as limited by the provisions we have before us, the State would not have the authority to reach the party who is brought into the State by virtue of this Federal process, hence the basis that one sees in the ordinary diversity case of a Federal court exercising authority coordinate with, parallel to the State court, would not be present.

It would be exercising authority peculiarly of the Federal court and I don't see where there is need for the effort to achieve the coordination with the State rules which the ordinary diversity case presents.

Senator BURDICK. Is one of the primary reasons for providing an independent choice-of-law rule in the multiparty cases the fact that section 2374(a) provides nationwide service of process and thus would draw to the court parties from many different States which might have different substantive provisions regarding the particular issues in controversy?

Mr. CAVERS. I think the fact that you do have this effect by virtue of the nationwide process means that in cases of this sort we are likely to have choice-of-law problems posed perhaps more frequently than in the ordinary case, but I don't believe that that would itself be the reason for adopting an independent Federal rule. You would very possibly have this kind of situation presented in a case where a State was exercising powers under a general long-arm statute in bringing in people from other States.

I think what we have to distinguish this case is the fact that here we are assuming the exercise of a distinctive and independent Federal power.

Senator BURDICK. Is one of the reasons suggested for abandoning *Klaxon* in these cases directed to the effectuation and development of multi-State interests, or it is simply a reflection of the undesirability of being bound by *Klaxon* in those cases?

Mr. CAVERS. I think you have both elements present. I see a situation where *Klaxon* is not as appropriate as in the normal case. What the choices will be in three exceptional cases is going to have to depend in many instances on the particular issues presented and which choice of laws are indicated. In some situations it may be that there will be present an opportunity for making a wise choice that would be peculiarly adapted to the multi-State problem. A principal basis for the provision is the fact that there isn't the rationale, the need for the *Klaxon*, and there isn't the risk in taking *Klaxon* away that would be presented in the ordinary case.

Senator BURDICK. Which of the arguments advanced in your *Klaxon* memorandum explains why the State choice of law rules to be chosen are those of the State in which the Federal court is sitting?

Mr. CAVERS. I have seen the Federal court as I think one would see it in its historical role as sitting as a coordinate tribunal in a State. This is not dictated by the Constitution but has been a choice the Congress has persisted in, and I think wisely, over the years. If you have such a tribunal, it seems to me important that there be an effort made to preserve uniformity between its decisions and the decisions of the State on issues where the State has rules. Also we see the opportunity, if this is not required, of a divergence which would enable the Federal court to thwart local policies, as noted by Mr. Justice Reed in the *Klaxon* case. These two factors operate together.

Senator BURDICK. Professor, you have advanced some practical reasons for not abandoning *Klaxon*. What is the theoretical justification for your position, that is, for assigning the establishment responsibility for choice of law rules to the State courts?

Mr. CAVERS. I think I go back really to what I just said in response to the previous question; that is, I see the Federal court as having been cast in the role of a tribunal coordinate to the State court and in that role it seems to me wise for it to conform to the State decisions as to the reach of State substantive laws. Of course, all cases don't involve the application of the forum State's substantive laws but very frequently they do. If you subject the State's rules to the will of the Federal courts as to their application, you may frustrate State policies in ways which, it seems to me, are not desirable in terms of the effective functioning of a federal system.

I might allude to a conversation I had quite recently with a very distinguished European scholar who has been engaged in discussions with other scholars in Europe as to the possibility of choice-of-law legislation in the Common Market countries—uniform legislation. He came forward with some ideas for a system which he thought would both be certain in application and give satisfactory results; and, with regard to the uniformity and ease of application, it may well be that he was correct.

The difficulty I saw in it was the fact that these rules were very heavily weighted on the side of manufacturers and sellers as against the other parties to the bargain. This would mean a situation in which you would buy the uniformity of the law in their kind of federal system at the price of protection of interests that some States might feel were important from the standpoint of the consumer or the distributor or the local party.

This kind of issue is posed very frequently, I think, when a State adopts a regulatory statute creating new duties. That statute might be extended to situations that went beyond the immediate lines of the State in choice-of-law situations.

I am not happy about the thought of a district court taking a position that Federal uniformity requires the effect of such a statute to be kept within the domestic bounds. This is the type of policy decision which I think we ought, as long as we are using the Federal courts for special purposes, to leave to the States and not open the door to that type of conflict.

Senator BURDICK. You touched on a very interesting parallel which may be apart from our discussion today, but it seems to me the Common Market is going to have a lot of conflict-of-law problems.

Mr. CAVERS. They do and they are puzzled by this and they have committees working on it.

Senator BURDICK. Are they going to have any overall system comparable to a federal system embracing all Common Market nations, or what are they going to do?

Mr. CAVERS. I don't know that they know yet. In some respects, I think they are thinking in terms of the possibility of uniform laws and, in other situations, of the possibility of coordinating the situations, and in still others of the possibility of using as an interim device a common set of conflict rules.

I may add the problem will be more difficult to work out with the United Kingdom as a part of the Common Market than it would be if they were all civilian law countries.

Senator BURDICK. A whole new ball game for the European courts. With all of these transactions going on across the Channel, there will be some conflicts. That is not our problem today.

Professor, in your book, "The Choice of Law Process," you suggested, on pages 217-218, that to impose Federal choice of law rules might be incompatible with the freedom the Supreme Court has allowed the States under the full faith and credit laws.

My question is whether or not the Supreme Court cases applying the due-process clause or a full faith and credit clause to conflict of law issues addressed itself to the question of which courts within our federal system could most appropriately develop conflicts of laws?

Mr. CAVERS. I think it is reasonable to assume that they were not concerned with the problem or the issue posed by *Klaxon*. These were cases involving State conflicts and the extent to which the Supreme Court thought a State should have the power to make its own determination.

As you will recall, there was a period when the Supreme Court appeared to be moving into this choice of law field and had been establishing a set of rules which would in effect have made conflict of law a branch constitutional law. About the mid-1930's, not long before *Klaxon*, the Court backed away very sharply from that position and has remained away from it since then. I think they recognize that, as far as the Constitution is concerned, the States ought to enjoy a degree of freedom even though it means that two States will each have something to say about the same question. This is something they are prepared to let the States live with rather than assume the job of trying to specify which of those two States should be the dominant one.

Senator BURDICK. That differs from the *Erie* rule in that it is buttressed by the Constitution.

Mr. CAVERS. Yes. I regard the *Erie* rule as a constitutional pronouncement because of the fact that, otherwise the Federal courts would be exercising a legislative jurisdiction which is not conferred by the Constitution on the Federal—

Senator BURDICK. Stated another way, isn't it clear that those decisions regarding the constitutional limits of choice-of-law would apply equally to the Federal courts if *Klaxon* were overruled?

Mr. CAVERS. That is certainly the case. It means that the Federal courts would have the same freedom that the States have to select the governing law from several jurisdictions and would, therefore, be open to developing a body of rules quite different from those of the State in which they were sitting.

Senator BURDICK. Would the Federal courts, if directed to choosing the most appropriate choice-of-law, interfere with a substantive policy of a State which the State ought to be able to enforce?

Mr. CAVERS. Would the Supreme Court have that effect?

Well, on the basis of the views thus far that have been prevailing, that is, since the turnaround in the 1930's in the Supreme Court, a very wide range of freedom is given to States having genuine interest to advance by the application of their law to pick their own law, and I would suppose that it would only be where the State ventured beyond those particular bounds that the Supreme Court would intervene.

I am not sure that I am addressing myself to quite the problem posed by your question.

Senator BURDICK. Yes. Let's turn to another problem. You have suggested that the *Klaxon* rule ought not to be binding in multiparty cases because the parties have been brought in by virtue of a congressional decision to establish nationwide service process and reach parties not subject to State court jurisdiction. However, that may not be true of interpleader cases.

If we could take an example of an interpleader case, *State Farm Fire and Casualty Co. v. Tashire*, 386 U.S. 523 (1967). In that case a Greyhound bus collided with a pick-up truck in California. Two of the passengers aboard the bus were killed, 33 persons injured, as were the bus driver, the driver of the truck and its lone passenger. One of the dead and 10 of the injured passengers were Canadians; the rest of the individuals involved were citizens of five American States.

The litigation began when four of the injured passengers filed suit in California State courts. Named as defendants were Greyhound Lines, Inc., a California corporation; the bus driver; Mr. Clark, who drove the truck; and Mr. Glasgow, the passenger of the truck, who was apparently the owner as well. Each of the individual defendants was a citizen of Oregon. Before these cases could come to trial or before other suits were filed in California or elsewhere, petitioner State Farm Fire and Casualty Co., an Illinois incorporation, brought an action in the nature of interpleader in the U.S. District Court in Oregon.

State Farm had an insurance policy on Mr. Clark, the driver of the truck, for bodily injury liability up to \$10,000 per person and \$20,000 per occurrence, and for the legal representation of Clark in actions covered by the policy. The insurance company paid into the

court the sum of \$20,000 and asked the court to require all claimants to establish their claims against Clark and his insurer in this single proceeding and in no other.

Jurisdiction was predicated upon 28 U.S.C. subsection 1335, the Federal Interpleader Statute, and upon general diversity citizenship, there being diversity between two or more claimants to the fund and between State Farm and all of the named defendants.

That is a long statement of facts. Are you still with me?

Mr. CAVERS. Yes, I am.

Senator BURDICK. My question is, if this case had proceeded under a long-arm statute where all of the claimants would have been able to gain services upon the individual Oregon defendants, why is it that, if jurisdiction is based on a long-arm statute, the conflict-of-law rules of California would apply? Aren't those two cases functionally equivalent? Do you follow me?

Mr. CAVERS. Yes, I think I do; at least, in the sense I think I see the general nature of the problem and I think the case is a good one to pose the situation that we have to worry about.

In the first place, in a situation of this sort where California has equipped itself with a long-arm statute, it seems to me appropriate enough, indeed very appropriate, for the California court to reach this decision even though a lot of people from a lot of States are involved and hence what we have in the Federal intervention in the case is a situation which comes into being only because California, for whatever reason, has failed to equip itself with appropriate process.

We then come to the Federal authority and ask for Federal authority to reach people who would otherwise not be reached. Once you bring these people into the Federal forum, it seems to me you do not have the basis for saying that the Federal forum is bound to recognize the rules of the State in which it is sitting. That becomes more or less a coincidence.

Mr. MULLEN. Could I ask one question with regard to this? But the case is a statutory interpleader action and could be brought even if California did have a long-arm statute and could have brought all the necessary parties before the court. That situation I think is slightly different than the multiparty multi-State provisions where we can say that there would have been no State court that could have reached all of the parties.

The questioned posed is since the issues in controversy are the same, virtually the same in the interpleader action or in a direct action using the long-arm statute, why should *Klaxon* be followed in one case and not in the other?

Mr. CAVERS. If the same parties could be brought in by long arm, we in a sense resolve the same issue. I think that leads me to worry about the employment of the Federal conflicts rule in that situation. Rather than to turn it around and say that this makes me worry about California's ability to establish California's rules.

Senator BURDICK. Professor Cavers, I have no further questions, but counsel has some additional questions. I would like to say, Professor, that you have answered the oral examination in a very satisfactory manner and you have a passing grade.

Mr. CAVERS. Thank you very much.

I might add I thought I was going to be saved by the bell.

Mr. MULLEN. Professor, let's take a look at one more example. In the case of *Reich v. Purcell*, 67 Adv. Cal. 560,432 P. 2d 727, 63 Cal. Rptr. 31 (1967), an Ohio plaintiff sued a California defendant for an accident that occurred in Missouri. After the accident the Ohio parties moved to California, however, it is clear that that should not effect the case.

The issue in that case was whether the \$25,000 limit of the Missouri Wrongful Death Statute should apply when neither California nor Ohio had any limits for wrongful death actions.

Now suppose that a case were to arise today with precisely the same facts and a lawyer retained by the California party examined the law of Missouri and determined that Missouri courts would apply the Missouri limit to all wrongful death cases including those involving conflicts of law issues whenever the accident occurred in Missouri.

Now, should the lawyer, knowing that his client may have been negligent, be able to freeze the choice of law by instituting suit in the Federal district court in Missouri alleging some claim against the Ohio party—should he be able to block the result of *Reich v. Purcell* simply by starting suit in Missouri?

Mr. CAVERS. Mr. Mullen, I think you have posed a very good example of the fact that under the Klaxon rule we can have bad results, unfortunate cases. I think in making that concession I ought to point out that I view the problem as presenting a balance of choice between sets of difficulties and you have chosen here, I think, an excellent example of the difficulty that you have to face under Klaxon.

My hope would be that in the course of time a court in the situation of the Missouri court would say, "We recognize our statute as designed to protect Missouri defendants. This is a situation where the interests of the parties are not related to the objective of the statute, and, therefore, we rule that our statute does not apply in this case."

Even though that is my hope, I think this is one of the cases where the court is less likely to reach that type of solution than in cases involving rules governing the conduct of parties, because the legislation seems directed to all cases in the Missouri court, so I am not overly optimistic. I think this is, as I say, an example of Klaxon working in ways that are disappointing. Every now and again I pick up an advance sheet and see a case which is of this general species. On the other hand, I see cases in which Federal courts have exercised a good deal of ingenuity to avoid results that would seem to be counter to the desiderata of a Federal-State relationship.

There is one very interesting one I ran across the other day in a district court, I believe, sitting in North Carolina, where an action was being brought against the owner of an automobile registered in New York, a rental owner, whose lessee had taken the car down to North Carolina where the accident occurred. Under the North Carolina choice of law of torts, the North Carolina law would apply, and there would have been no recovery. But looking at the New York law which permits the liability to be imposed on the renter of cars for injuries caused by the lessee, the court following that case book favorite *Levy v. Daniel U-Drive Auto Renting Co.*, found that this case was not merely a tort case but also a contract case and this enabled the New York law to be applied on a contract theory.

This exemplifies the kind of action which I think one can hope for within the bounds of Klaxon. If a Federal court taking that liberty in interpreting the North Carolina choice of law rule has gone too far, a North Carolina court can wipe the decision off the books under Klaxon by making plain its rejection of the interpretation.

Mr. MULLEN. Professor, in a 1963 article in *Law and Contemporary Problems* you discussed the advantages of State autonomy within constitutional bounds for making choice of law policy, and there you suggested at page 7 that State X, which had made a prior decision concerning the extraterritorial effects of one of its laws, would not gain much by a decision of a Federal court similarly favorable to this policy because it would not extend the reach of X's law, and then you continue "On the other hand, the unfavorable decision of such a Federal court could contain the policies reached to wholly local situations and if broadly based tend to inhibit the reach of future State legislation in other fields."

And from that you concluded that a Federal conflicts rule would compel X to give up much more than it would receive in return if there were a Federal conflicts rule.

I would like to ask you a few questions about that statement.

Under the present autonomy doesn't X suffer from the possibility that if a fractional situation similar to the one in which they have made an extraterritorial application of their law, should arise in a court in State Y, the Y court is not at all bound by the X decision?

Mr. CAVERS. That is true. I noted in my statement the autonomy is not perfect. I think the actualities are that we will see this kind of problem arising principally as a consequence of States increasing their regulatory authority, imposing new duties on people by new State statutes, and this is proceeding in a number of directions. A State which has imposed such a duty under the present law with its process, long arm in character, can pretty well police that duty by reaching people who had come into the State or who had projected forces into the State. At the same time, if you had a Federal authority, it might well take the view that it had to generalize here. The result would be something like the position which my friend from abroad was proposing for common market solutions; in other words, applying the general validity of contract principle to operate across the board in the Federal system.

Looking at it from the standpoint of State Y, a number of these situations are cases where State Y has taken no legislative action; in Y they are working under the old common law rules in which no regulation is conceived. This may be a situation where the Y interest is comparable to the X interest. I think in actuality it is likely not to be. The X State has confronted the problem, has dealt with it, there is a lag in State Y, and it has not yet gotten to the same point. However, to say that the two States interests are the same, I think, is questionable. Moreover, in the situation in Y it may be that the party affected is not a Y citizen by an X citizen or a citizen of a third State, so that Y's interest is again diluted.

The Federal court does have the greater power to restrain, and I am somewhat concerned about that influence.

Mr. MULLEN. Restricted to the example you have given where State X would pass a special regulation law, I think I can see the point that you are raising.

What, if, however, it was an occasion where X had the old common law rules and State Y had adopted a special statute?

Mr. CAVERS. Where you have a situation in which a court is confronted by a rule giving people subject to that rule simply a privilege, the possibility exists that that privilege will be defeated by the exercise of authority outside the State imposing a duty. If it should happen that the X court has jurisdiction over the party from Y, it may look at the situation and Professor Cavers' principle of preference and decide it should apply the other State's law. That might be a wise decision.

Mr. MULLEN. I would certainly agree with you. My concern here rests in part on knowing that so many States have extended their adjudicatory jurisdiction in recent years through long-arm statutes which I would think tends to increase the cases where we may have some potential difference between the choice of law rules.

Mr. CAVERS. Though this is a subject on which extensive research might be called for, I think in general the effect of the long-arm statute is to provide a better forum for a case than would have been true without it. The forum is more likely to be a State which is an interested State in the sense that its policies are involved in the litigation which is bringing about results on the basis of facts that have occurred there. Hence the fact that, as a result of this, both the State and the Federal courts are likely to be applying their own State's law is probably to the good or more likely to produce a satisfactory result than when the plaintiff chases after the defendant somewhere else.

I grant you that isn't always the case. I have seen long-arm statutes applied under circumstances that are rather distressing, but, as I remarked before, we are in a field where we can't expect perfection but must hope for a wise balancing of the competing interests.

Mr. MULLEN. If we could turn to a slightly different subject. I realize you favor the retention of *Klaxon* but one of the reasons that I recall you suggested that it should not be abandoned is it would throw the U.S. District Court back into pre-*Erie* conflict cases. If Congress were to decide that *Klaxon* should be abandoned in general diversity situations, do you think it possible that Congress could direct the district courts to look first to the conflict rules of the State in which they sit and applying the general principles of *stare decisis* to only reach a different conclusion, if they felt weighing all of the precedent that it was appropriate to develop some new rule? In other words, what I mean is, is it possible for Congress to say no, you don't have to go back prior to 1938 to look for precedents?

Mr. CAVERS. Well, I think one could draft such a statute. I think the drafting of that statute would be a very difficult feat. But I think the drafting of it would be less difficult than the application and interpretation of it. To succeed somehow in giving the district court not merely a release from *Klaxon* but rather a direction to take a cold look at the State supreme court's pronouncements on the subject over the past years and decide whether or not these should be in effect overruled is not an easy business.

Mr. MULLEN. Well, I would concede that but in a sense is that not what you have done in regard to the multiparty cases?

Mr. CAVERS. It is a situation in which you free the Federal court from the compulsions of *Klaxon*. You don't attempt to direct them to do this or to do that in that situation and you aren't putting them in a situation that is within the bounds of the State jurisdiction which I take it you are in this hypothesis here.

Mr. MULLEN. Well, I am thinking of general diversity jurisdiction, but I am thinking of those cases within that jurisdiction which may involve the application of a long-arm statute and in which you may have many different parties and some interest of two or more States in the application of their substantive law provisions.

Mr. CAVERS. Well, certainly as you add parties and States to a controversy, you are dealing with problems which become extremely difficult from the choice-of-law standpoint regardless of the tribunal which is determining it. Moreover, as soon as you allow the Federal court to break away from the State doctrines, you have this opportunity, this temptation, to look for the Federal court as a way of getting away from the dictates of the State court, and you have the forum shopping phenomenon presented.

Mr. MULLEN. But not if the States were required to follow Federal choice-of-law rules.

Professor, do your arguments for saying that the application of the State choice of law rules for the Federal court, do they assume that the assumption of judicial jurisdiction also supports the use of that State's choice-of-law rules?

Mr. CAVERS. Well, I think one can say that, if a court has jurisdiction properly assumed in a case, a part of the function of the court in exercise of that jurisdiction is to make choices among the laws that may be involved.

I don't think it follows. I wouldn't like to be thought to suggest, that because it has jurisdiction and because it is free to make that choice, it should always choose its own law. In the exercise of long-arm powers, it may well be that it should not.

Mr. MULLEN. Your colleagues, Professors von Mehren and Trautman in the book of multi-State programs, they say the choice of law question within the Federal system is "inherently and unquestionably a Federal problem." What is your view?

Mr. CAVERS. Well, I think one can certainly recognize that it is a Federal problem, but the question of how you resolve that problem in the light of the complexities of 50 jurisdictions and the kind of Federal court system that we have, does not, it seems to me, demand that its resolution be the creation of this anomaly peculiar to our system of law, a second set of courts.

Mr. MULLEN. I would ask just one last question in regard to the case of *Seider v. Roth*, 216 NE 2d 312 (1966), a New York case, which established quasi in rem jurisdiction whenever a party had an insurance policy from an insurance company which did business in the State of New York. My question is whether we should consider an amendment to section 1305(c), which allows for transfer, upon request of a defendant, to except cases brought under the *Seider* doctrine, so that in those cases the transferee court would not be required to apply the conflict-of-laws rules of the transferor court.

Mr. CAVERS. If I may I would like to amplify a little your statement of the case in order for the record to show the special nature of this *Seider v. Roth* decision. It was the result of the initiative of a New Yorker who was the insured, and the courts which have handled these cases since *Seider v. Roth* have limited the doctrine. Thus, in a second circuit decision where the doctrine was attacked on constitutional grounds, the court recognized that the statute was a proper exercise of New York power to protect a New York citizen. If I, a citizen of Massachusetts, were insured in a company which is doing business in New York, I couldn't have the benefit of this rule. It is a very special, and I think a very questionable, one.

One of the problems that your question poses is one that I am unfortunately not able to answer and that is, what is the effect of a defendant's moving to transfer a case on his liability. The accident may have occurred in Utah, and here he is being sued in New York because the plaintiff happened to have an insurance policy in a company doing business in New York.

If that defendant brings the case to Utah, which we shall assume is the proper place from the standpoint of witnesses, convenience, and trial, does he abandon the privilege, which under *Seider v. Roth* he has; that is, of not being liable beyond the extent of the policy, even though he participates in the defense of the case—another anomaly of *Seider v. Roth*.

It seems to me, if you could say that, by virtue of getting the case into a proper forum, the defendant has protected himself against the anomalies in *Seider v. Roth*, and, therefore, should be exposed to the full degree of liability, it may be that he should also have the benefit of the Utah rules as to choice of law. In other words, the anomalous New York rule allowing the New Yorker to reach the defendant shouldn't be extended to the degree that would allow the New Yorker the benefit of New York choice-of-law rules in Utah. (I may add so far that New York have been very plaintiff beneficial.)

This might be different if you said that, although the place of trial was transferred, the effect of the transferred case was still limited by the New York restrictions. Then you might say that this remains essentially the New York case with the protection of the defendant afforded by the New York restrictions being carried over to Utah and, in that event, we shouldn't have a change in the choice-of-law rules.

Mr. MULLEN. Thank you very much. It has been very enlightening.

Mr. CAVERS. You are welcome. It has made me feel that I am no longer emeritus but am right back in a conflicts classroom.

Senator BURDICK. Thank you again, Professor Cavers.

The subcommittee requested the presence of three other witnesses to give their views regarding conflict-of-laws questions in the Federal courts. They are Professor William Baxter of Stanford Law School; Professor Harold Horowitz of UCLA Law School; and Professor Willis Reese of Columbia Law School. They were unable to attend these hearings. Without objection their statements and articles will appear in the appendix of these hearings.

(Whereupon, at 1:05 p.m. the hearing was adjourned subject to call of the Chair.)

APPENDIX I

SUBMITTED STATEMENTS AND VIEWS

JOSLIN, CULBERTSON & SEDBERRY,
ATTORNEYS AND COUNSELLORS AT LAW,
400 NORTH CAROLINA NATIONAL BANK BUILDING,
Raleigh, N.C., October 6, 1971.

STATEMENT OF WILLIAM JOSLIN ADDRESSED TO THE SUBCOMMITTEE OF THE
SENATE JUDICIARY COMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

I am William Joslin, a practicing lawyer of Raleigh, North Carolina, and a member of the North Carolina Bar for 23 years. I am the senior member of a firm of four lawyers who are engaged in general civil practice. We have occasion to go into both federal and state courts, usually in connection with questions in the field of corporate, commercial, real property or tort law. I speak only for myself as a representative member of the North Carolina Bar. Our state association thus far has not considered the proposed curtailment of the federal courts diversity jurisdiction. Indeed, I do not believe many of our members are yet aware of the provisions of Section 1302(a) and Section 1302(b) of Senate Bill 1876. I feel many of them would want to voice their opposition to it if they knew of the sharp reduction in diversity jurisdiction contained in it.

Our own practice takes me into the state courts more often than into the federal courts, even when we have a choice of forum, as in the diversity cases. The choice in any particular case depends on a number of factors, such as the greater latitude allowed in questioning jurors in state courts, the single-county composition of the jury in state court as compared to the multicounty jury in federal court, the condition of the dockets in the respective courts, and my acquaintance with the respective judges in the state and federal courts. Conversely, when defending, I weigh the same factors in deciding whether to ask for removal from the state court to the federal court.

There are two compelling reasons why I oppose the proposed change in the jurisdiction of the federal courts. First, it is my judgment that our present dual court system promotes the ends of justice in the great majority of cases in which the attorneys have a choice of forum. The coexistence of the state and federal courts in the diversity cases has a balancing effect, preventing abuses of judicial machinery in either system. I think most attorneys would agree that the present optional system in most diversity cases is not only a "tool of the trade," but is also a substantial aid in seeing that neither side has any undue procedural advantage over the other.

Secondly, the dual system for diversity cases has certainly helped to modernize the North Carolina practice and procedure. In 1967, after much consideration, our General Assembly adopted a completely revised set of Rules of Practice modeled after the federal rules. The passage of these rules was spurred and helped in no small measure by the experiences our Bar previously had with federal rules, largely obtained in diversity cases.

For instance, our pre-1967 discovery practice in the North Carolina courts was completely inadequate. Acquaintance with the federal discovery practice changed many North Carolina lawyers' thinking about our old practice. The North Carolina Rules still differ significantly from the Federal Rules in some details. However, the Bar is aware of the differences and undertakes to incorporate the best features of the Federal Rules into our procedure. In my opinion, the existence of the federal diversity jurisdiction has been and still is a strong force for informing our Bar and encouraging it to continue a critical study of our North Carolina Rules. If the diversity jurisdiction were curtailed, there would be fewer occa-

sions for many North Carolina lawyers to consider the Federal Rules, and hence, less awareness of their advantages over our Rules.

For these reasons, I respectfully request the Subcommittee to reject the reduction in the diversity jurisdiction of the federal courts as proposed by Sections 1302(a) and 1302(b).

STATEMENT OF WILLIS L. M. REESE BEFORE U.S. SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY, HEARING ON S. 1876, "FEDERAL COURT JURISDICTION ACT OF 1971."

My name is Willis L. M. Reese. I have been a member of the New York bar since 1938 and a member of the Supreme Court bar since 1945. Since 1946, I have been a member of the faculty of the Columbia University Law School where I am presently Charles Evans Hughes Professor of Law and Director of the Parker School of Foreign and Comparative Law. I am also the Reporter of the Restatement (Second) of Conflict of Laws, which subject I have taught at Columbia for nearly twenty-five years.

I have been asked to give my opinion of the *Klaxon Rule* and of the choice-of-law provisions contained in §§ 1305(c), 1306(c), 2363(c) and 2374(c) of the Federal Court Jurisdiction Act of 1971. This will be done in the order stated.

The *Klaxon Rule* (that announced by the Supreme Court in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941)) is that in diversity cases the federal courts must apply the choice-of-law rules prevailing in the states in which they sit. Stated in other words, the *Klaxon Rule* provides that, in a diversity case having contacts with two or more states, a federal court must apply the same rule as would be applied by the courts of the state in which it sits for determining which of the states involved is the state of the applicable law, i.e., is the state whose substantive law will be applied to determine the issue at hand. The prevailing opinion, in which I concur, is that the *Klaxon Rule* is not constitutionally compelled and could be changed by act of Congress. The question, therefore, is whether abrogation of the Rule would be desirable. I do not believe so.

The best argument, in my opinion, that can be advanced for abrogating the Rule is that by doing so one would make it possible for the federal courts to play a more active role in the development of satisfactory rules of choice of law. This argument would start with the universally conceded proposition that the field of choice of law is presently in a state of flux that might indeed by said to border on chaos. Many formerly well-established rules have been abandoned, and doubt is frequently expressed about the viability of those rules that remain. On the other hand, the need for effective choice-of-law rules has never been greater than it is today when men are frequently on the move from state to state and frequently enter into contracts and other transactions that have elements in more than one state. By reason of their undoubted ability and experience, the federal judges are admirably equipped to play an important part in the development of new rules of choice of law. But so long as the *Klaxon Rule* persists, the role of federal judges in this area will of necessity be curtailed by reason of their obligation to apply the same choice-of-law rules as do the courts of the state in which they sit. It has also been argued that, if freed from the *Klaxon Rule*, the federal judges might be expected to develop a federal system of choice of law which would provide greater certainty and predictability for those who bring actions in the federal courts. By this means, the quality of federal justice would be improved.

The countervailing arguments, in my opinion, are of greater force. Abrogation of the *Klaxon Rule*, which has been in effect for some thirty years, would create uncertainty. Initially, there would be no way of knowing what sort of choice-of-law rules the federal courts would develop and, in particular, whether these courts would feel bound to follow pertinent federal authority antedating *Eric R. Co. v. Tompkins*, 304 U.S. 64 (1938), the case which first established the principle that in diversity cases the federal courts must apply the law of the state in which they sit. Not surprisingly, the choice-of-law rules applied by the federal courts in the pre-*Eric* period were generally the same as those applied by the state courts. Since that time, however, many of these rules have proved inadequate in practice and, for that reason, have been largely abandoned by the state courts. It would be unfortunate if such rules were now to be given a renewed lease on life by the federal courts. In any event, if the *Klaxon Rule* were to be abrogated, there would inevitably be a period of greater uncertainty and of less

predictability than exists at present, since there would be no way of knowing what sort of choice-of-law rules would be fashioned by the federal courts. Worse still, abrogation of the *Klaxon Rule* would inevitably result in situations where a litigant would choose to bring suit in a federal, as opposed to a state, court in order to avoid the result which application of the state choice-of-law rules would bring. Resort to a federal court in a situation such as this in order to affect the substantive result of litigation is just what the Supreme Court sought to avoid by its ruling in the *Eric* case.

In addition, it is doubted whether the *Klaxon Rule* in the long run will seriously curtail the role than can usefully be played by the federal courts in the development of new rules of choice of law. There are in effect two situations. The first is where the courts of the state in which the federal court sits still apply the formerly well-established rules that are now in the process of being abandoned. In this situation, the federal court is indeed in a strait jacket; it must apply these choice-of-law rules even though it considers them unwise and outmoded. A mitigating factor of some importance, however, is that the states applying such choice-of-law rules are becoming fewer in number. The second situation is where the federal court sits in one of the ever-increasing number of states which have abandoned the old choice-of-laws rules and have not as yet substituted anything very definite in their place. Here the federal courts will have a relatively free hand in developing new rules of choice of law. Lacking definite guidance from state decisions, the federal courts will obviously assume, and should assume, that a state court would decide the case in the way, and for the reasons, that the federal court believes to be correct. Of course, there is always the chance that a choice-of-law rule fashioned by a federal court will not appeal to the courts of the state in which the federal court sits. If so, the rule will have to be abandoned. Nevertheless, in such a case, the federal court will have played a part in the development of choice-of-law rules. It will have suggested a rule and will have given the reasons which in its opinion support the rule. To be sure, the rule did not ultimately meet with favor. But it is by such trial and error that the law develops.

It is also doubted whether abrogation of the *Klaxon Rule* would lead to the development of uniform federal rules of choice of law. This could not be accomplished unless the Supreme Court were to review a substantial number of the choice-of-law decisions of the lower federal courts. The Supreme Court, however, could hardly be expected to add this additional task to its already heavy burdens. Abrogation of the *Klaxon Rule* would therefore probably lead to there being even greater diversity in the choice-of-law field than there is at present. Not only would there be diversity, as there is at present, in the choice-of-law decisions of the various states, there would also be diversity in the choice-of-law decisions of the various federal circuits.

The *Klaxon Rule*, however, has been extended beyond its proper limits. It has been applied by the Supreme Court (in *Griffin v. McCoach*, 313 U.S. 498 (1941)) to a diversity case over which the state courts would not have had jurisdiction but which could be entertained by a federal court by reason of a special federal jurisdictional statute. Since the suit could not have been brought in the state courts, there is no reason in fairness or in logic why the federal court should be required to apply the choice-of-law rules in force in the state in which it sits. To do so, might indeed be unfair to a party who was forced to stand suit in that state only because of the federal jurisdictional statute. This is a situation in short where it is believed that the federal courts should be permitted to develop choice-of-law rules of their own. This is what is done by §§ 2363(c) and 2734(c) which will be discussed hereafter.

I now turn to a consideration of §§ 1305(c), 1306(c), 2363(c) and 2374(c) of the Federal Court Jurisdiction Act of 1971. The first two of these sections (§§ 1305(c) and 1306(c)) deal with the situation where there has been a transfer of the action from the federal district where suit was originally brought to another federal district "(f) or the convenience of parties and witnesses or otherwise in the interest of justice." Such a transfer is a device which only the federal system provides; there is no means for transferring an action from the courts of one state to the courts of another. Section 1305(c) deals with the situation where the transfer has been made at the request of the defendant. It provides that the transferee court shall apply the choice-of-law rules that the transferor court would have applied "including rules with respect to refusal to adjudicate the merits of the controversy and rules for selecting the applicable rules of decision." By reason of the *Klaxon Rule*, the choice-of-law rules that

the transferor court would have applied are those of the state in which the court sits. Section 1305(c) is in accord with the decision of the Supreme Court in *Van Dusen v. Barrack*, 370 U.S. 612 (1964). It is thought to be clearly correct. The plaintiff has traditionally had the power to select a forum with favorable choice-of-law rules. The defendant should be permitted to seek a transfer for reasons of convenience but not for the purpose of obtaining the application of what is to him a more favorable rule of law.

Section 1306(c) deals with the situation where the plaintiff obtains the transfer. The section provides that in this situation the transferee court should apply the same choice-of-law rules that it would have applied if the action had been commenced before it. By reason of the *Klaxon Rule*, these choice-of-law rules would be those of the state in which the transferee court sits. This provision likewise is thought to be clearly correct. If the rule were otherwise, the plaintiff could bring suit in a clearly inconvenient forum in order to obtain the benefit of that forum's choice-of-law rules and then, without losing the benefit of these rules, could transfer the case to a more convenient forum. This would be clearly inequitable.

Sections 2363(c) and 2374(c) deal with situations where, in order to obtain jurisdiction over indispensable parties, process "may run anywhere within the territorial limits of the United States and anywhere outside those territorial limits that process of the United States may reach . . ." These situations involve interpleader (§ 2363) and those cases where several defendants who are "necessary for a just adjudication" of the plaintiff's claim are not all amendable to the process of any one territorial jurisdiction. (§ 2374). Both of these sections provide that in the situations with which they deal "the district court may make its own determination as to which state rule of decision is applicable." As such, these sections would release the federal courts from the compulsion of the *Klaxon Rule* and of *Griffin v. McCoach*, 313 U.S. 498 (1941). This likewise is thought to be eminently sound. These sections deal with situations where suit could not have been brought for lack of jurisdiction in the state where the federal court sits and can only be brought in the federal court by reason of a special federal jurisdictional statute.

Under such circumstances, there is no reason why the federal court should be required to apply the state choice-of-law rules. For the federal court to do so might indeed be unfair to a defendant who is brought before the court only by reason of the federal jurisdictional statute and where the state where the court sits has peculiar choice-of-law rules which would work to the defendant's disadvantage. It will be noted that these sections permit, but do not require, the federal district court to fashion its own choice-of-law rules. The court is authorized, if it so sees fit, to apply the choice-of-law rule of the state in which it sits. This too seems proper. There will undoubtedly be situations where application of the state choice-of-law rule would be appropriate. This would presumably be so, for example, in a situation where the choice-of-law rules of all states having significant contacts with a given issue are the same.

In short, all of the provisions discussed above have my hearty approval.

[Reprinted from 46 F.R.D. 141 (1969)]

JURISDICTION OF FEDERAL COURTS

A SUMMARY OF AMERICAN LAW INSTITUTE PROPOSALS

By

Professor RICHARD H. FIELD

Introductory Note

The Judicial Conference of the United States is considering the American Law Institute study which may be purchased in its entirety from the American Law Institute in Philadelphia * and requests comments of the bench and bar of the country on these proposals to assist the Conference in making its recommendations. Any comments should be directed to Ernest C. Friesen, Jr., Director, Administrative Office of the United States Courts, Supreme Court Building, Washington, D. C., 20544.

The following summary of the American Law Institute proposals with reference to the jurisdiction of federal courts and related matters, approved by the Institute at its Annual Meeting in May, 1968, has been prepared by Richard H. Field, Chief Reporter for the Institute's Study of the Division of Jurisdiction between State and Federal Courts, and Professor of Law at the Harvard Law School. The Institute's Official Draft, containing the full text of the proposals and extended commentary on them, is being published in the spring of this year.

This Study originated from a suggestion of Mr. Chief Justice Warren in an address to the Institute at the Annual Meeting in 1959, when he said: "It is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism." The Institute accepted the thesis that there are basic principles of federalism and that it is essential to allocate judicial business between state and federal courts in the light of those principles. This Study reflects an eight-year effort to make such a principled allocation.

* The American Law Institute, 101 N. 33rd St., Philadelphia, Pennsylvania 19104.

The proposals are for a unified treatment of federal jurisdiction to be included in the Judicial Code. Their adoption would permit repeal of chapters 85, 87, and 89 of the existing code. The sections here presented use numbers not used in the present code and place them in separate chapters for the several heads of jurisdiction, each chapter containing its own provisions for original and removal jurisdiction, venue, process, and related matters. Later chapters treat matters common to all heads of jurisdiction. Finally, there is a proposed new chapter dealing with an extension of diversity of citizenship jurisdiction for multi-party multi-state actions.

The proposed changes from existing law that are likely to be of the greatest general interest include the following: (1) denial to a citizen of the state in which the district court is held of the right to invoke diversity jurisdiction in that district because his adversary is an out-of-state citizen; (2) treating a foreign corporation with a permanent establishment in a state the same as a local citizen, and thus denying it the right to invoke diversity jurisdiction, either originally or on removal, in that state; (3) not allowing a commuter or other person whose principal place of business or employment is in a state of which he is not a citizen to invoke diversity jurisdiction in the state where he works; (4) allowing any defendant who could remove an action to federal court if sued alone to do so despite joinder of another defendant either unable or unwilling to remove; (5) treating an executor or other personal representative as a citizen of the same state as the decedent or other person represented, so that diversity cannot be created or destroyed by such an appointment; (6) allowing removal to a federal court on the basis of a substantial defense arising under the Constitution, laws or treaties of the United States; (7) allowing trial by jury of all admiralty and maritime claims for personal injury or death; (8) simplifying and clarifying the law concerning the abstention doctrine and the provisions with reference to three-judge courts; (9) broadening the power of a federal court to restrain state court criminal prosecutions in certain civil rights cases where the very existence of a state prosecution may have a chilling effect on persons who wish to exercise rights guaranteed by the Constitution of the United States; and (10) a broadening of diversity jurisdiction to provide a federal forum, with nationwide service of process, for actions in which state courts cannot do adequate justice because parties needed for a just adjudication are beyond the reach of any single state.

The detailed proposals follow:

Chapter 84—District Courts: General Diversity of Citizenship Jurisdiction.

Section 1301. The basic provisions for diversity of citizenship jurisdiction are preserved. The following changes have been made:

- (1) For diversity purposes an alien corporation with its principal place of business in a state is a citizen of that state.
- (2) To clear up doubts in existing law, a corporation is deemed to be a citizen of *every* state and foreign state by which it has been incorporated.
- (3) A partnership or unincorporated association capable of suing or being sued in its common name is deemed to be a citizen of the state of its principal place of business.
- (4) An executor, administrator, or any person representing the estate of a decedent or appointed pursuant to statute with authority to bring an action for wrongful death is deemed to be a citizen only of the same state as the decedent; and the representative of an infant or incompetent is given similar treatment. The purpose is to prevent either the creation or destruction of diversity jurisdiction by the appointment of a representative of different citizenship from that of the decedent or person represented.
- (5) When an action within the diversity jurisdiction is brought, jurisdiction is extended to any claim arising out of the same transaction or occurrence brought by any member of the plaintiff's family living in the same household. The typical case is where a family member's claim falls short of the jurisdictional amount.

Section 1302. The diversity jurisdiction cannot be invoked, either originally or on removal by:

- (1) A citizen of the state in which the district court is held. This reflects existing law as to removal jurisdiction, but is new in depriving a plaintiff of the right to bring a diversity action in the state of which he is a citizen.
- (2) A corporation, partnership, unincorporated association, or sole proprietorship, incorporated in or having its principal

place of business in the United States, in any district court held in a state where it has maintained a local establishment for more than two years, but this prohibition applies only to claims arising out of the activities of that establishment and only to entities operated primarily for business purposes. A "local establishment" is a fixed place of business where or in connection with which as a regular part of such business activities of any of the types enumerated in the definition are carried on. The recurring theme in this enumeration is that of dealings with persons within the state, the kind of activity that is almost invariably competitive with local enterprise. A fixed place of business for production or processing is included, although here there is not necessarily competition with local enterprise except in the labor market.

(3) A natural person in any district court held in a state where he has had his principal place of business or employment for more than two years. The primary purpose is to prevent the commuter who crosses a state line in order to get to his regular place of work from invoking diversity jurisdiction in the state to which he commutes. The section also prevents a corporation or individual barred by the two-year provision from invoking the jurisdiction at the time the claim arose from gaining access to the federal court by abandoning a local establishment or place of employment thereafter.

Section 1303. The basic venue provisions for diversity cases allow venue to be laid in (1) a district where a substantial part of the events or omissions giving rise to the claim occurred or where a substantial part of property that is the subject of the action is situated (this is substantially the present law as a result of a 1966 amendment to 28 U.S.C. § 1391, but this proposal recognizes that there may be more than one such district, thus giving the plaintiff a choice and avoiding threshold litigation as to where the claim arose); (2) a district where any defendant resides, if all defendants reside in the same state; or (3) a district where any defendant resides if the claim arose abroad. The district of the plaintiff's residence is no longer a proper venue. A non-resident alien may be sued in any district (under present law any alien, resident or non-resident, may be sued in any district). Venue as to a corporation is restricted to the district where it has its principal place of business or to any district in the state of its incorporation if its principal place of business is in another state. In view of the adoption of the place-of-events venue, a corporation is not protected by this residence limitation

against suit in an appropriate district. The residence for venue purposes of a partnership or other unincorporated association is the district where it has its principal place of business. Finally, actions for trespass upon or harm done to foreign land are made transitory and subject to the usual venue provisions. This is a change from the present law.

Section 1304. This section deals with removal jurisdiction in diversity cases. When there is a single defendant, the only departure from existing law is the prohibition against removal by those persons who are not, by reason of § 1302, permitted to invoke federal jurisdiction in the state where the action is brought. This preserves existing law denying removal to a citizen of the state, but also prevents removal by a person whose principal place of business or employment is in the state. Removal by an enterprise with a local establishment is also prohibited in actions arising out of the activities of that establishment. In multi-party actions a defendant has the same right to remove that he would have if sued alone by any party making claim against him; he may remove the entire action and not merely the claim against himself. (Thus a plaintiff cannot prevent removal by joining a local citizen as a party defendant). Third-party defendants are in general given the same right, but not in specified categories of cases involving insurance or employer-employee relationships where the third-party defendant would be likely to be subject to the control of the original defendant. A plaintiff defending a counterclaim is, contrary to existing law, treated as a defendant for purposes of removal. Resolving a conflict in existing case law, removal is permitted by a defendant with a claim against the plaintiff in excess of the jurisdictional amount if it arises out of the same transaction or occurrence as the plaintiff's claim and if the sole reason why the plaintiff's action would not be removable is that the amount claimed fails to satisfy jurisdictional requirements. The right of removal does not turn upon whether or not the counterclaim is compulsory under state law.

Section 1305. The limitation upon transfer of a diversity action from one district to another on motion of a defendant to a district where it "might have been brought", together with the restrictive interpretation of these words by the Supreme Court, is removed. The sole test is whether the transfer is for the convenience of parties and witnesses or otherwise in the interest of justice. Appellate review of the trial court's exercise of discretion on such a motion is barred. Transfer is prohibited, however, to a district where both sides would be barred from invoking jurisdiction by reason of § 1302, since such a transfer would

frustrate the policy of preventing federal litigation in a forum that neither side deserves. In this situation the court, upon a finding that there is no other place in which trial would be appropriate, shall stay the proceedings if it can do so on such terms as will assure the plaintiffs an opportunity to maintain suit upon the claim in an appropriate state court. To this end the court may condition a stay upon amenability of all defendants, by consent or otherwise, to jurisdiction over the person in the designated state, upon waiver of any applicable statute of limitations in that state, or upon such other terms as may be deemed proper. The subsection further gives the plaintiff the benefit of any attachment obtained in the stayed action. To prevent delays, decisions staying proceedings under this section are made reviewable only under the special interlocutory appeal provisions of § 1292 (c). The section also codifies the choice-of-law rule enumerated in *Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964), by providing that the transferee court shall apply the rules that the transferor court would have been obliged to apply.

Section 1306. Plaintiffs are here given a second chance to choose a forum upon the necessary showing of convenience and justice, but transfer is limited to a district where venue would be proper, the defendant is amenable to service, and no plaintiff is barred by Section 1302. Transfer is also allowed when venue is laid in the wrong district, with dismissal as an alternative if justice so requires. Appellate review of the trial court's exercise of discretion in a transfer motion is barred. The choice-of-law problem is resolved in a different way than in Section 1305, by providing that the law of the transferee forum is to be applied. The purpose is to prevent the plaintiff from obtaining a choice-of-law advantage by instituting his action in an inconvenient or improper venue. There is a provision for giving discretion to charge a transferring plaintiff with costs, including counsel fees, to compensate the defendant for expenses attributable to the failure to bring action in an appropriate court in the first instance.

Section 1307. This section strengthens the basic prohibition of 28 U.S.C. § 1359 against "improper" or "collusive" making or joining of parties by denying jurisdiction when it has been achieved by a joinder pursuant to an agreement or understanding between opposing parties. A further provision, not covered by existing law, requires a district court in determining its jurisdiction to disregard any sale, assignment or other transfer if an object (not necessarily the sole object) of the transfer was to enable or to prevent the invoking of diversity jurisdiction.

Chapter 85—District Courts: General Federal Question Jurisdiction.

Section 1311. Existing law, under the construction the courts have developed of 28 U.S.C. § 1331(a), is largely preserved. No amount in controversy is required and jurisdiction is extended in terms to declaratory judgment actions in which the complaint rests on federal law. Exclusive jurisdiction remains substantially unchanged, the significant difference being to make jurisdiction under the Securities Exchange Act of 1934 concurrent with the state courts, as has always been the case under the Securities Act of 1933, and thus to remove an apparently inadvertent disparity.

Section 1312. This section, dealing with removal jurisdiction, follows existing law except that for the first time removal is permitted from a state court on the basis of a federal defense or counterclaim. No amount in controversy is required for removal of actions within the original jurisdiction, but more than \$10,000 must be involved if removal is based upon a federal defense. The purpose is to prevent removal as a harassing tactic in small cases in which the claim is grounded upon state law. Removal is barred in specified categories of cases, as follows: (1) FLSA wage claims (resolving conflict under present case law); (2) FELA, Jones Act, and workmen's compensation cases arising under state law (as at present); (3) suits against carriers under the Carmack Amendment (now removable only if more than \$3000 involved); (4) actions for enforcement of state laws or for condemnation of property under state law; (5) removal on the sole ground that the defendant could not constitutionally be subjected to state process; and (6) removal on the ground that the action is barred by a judgment to which full faith and credit must be given or that federal law requires or forbids recourse to the laws of a particular state as a rule for decision in the case. The present law allowing removal of civil rights cases, civil or criminal, 28 U.S.C. § 1443, is carried forward except for omission of part of clause (2) of that section. The omission is because, under the Supreme Court's decision in *City of Greenwood, Miss. v. Peacock*, 384 U.S. 808, 824, 86 S.Ct. 1800, 16 L.Ed.2d 944 (1966), it adds nothing to removal provisions already elsewhere in the law, and preserved in these proposals. See also proposed § 1372(7) providing for broadened injunctive relief against state criminal prosecutions. There is a change in the law requiring dismissal of a removed action on the ground that it was within the exclusive jurisdiction of the federal court

and hence was mistakenly brought in state court. If such an action is removed, these proposals would allow its retention for adjudication in the federal court.

Section 1313. The law that permits "pendent jurisdiction" over state-law claims closely related to the federal claim on which jurisdiction is based is here codified and somewhat broadened. The test, couched in familiar procedural terms, requires that the state claim arise out of the same transaction or occurrence as the federal claim and that there be a substantial common question of fact. It is also provided that such jurisdiction exists over state claims even where a party beyond the reach of state process is brought into court by extraterritorial service as authorized by federal law. This resolves a question on which the cases are divided. In a removed case, any state claim not within the pendent jurisdiction is to be remanded. As under present law, discretion is given either to retain or dismiss a state claim remaining after disposition of the federal claim. In removed cases, the choice is between retention and remand of the state claim, and opportunity is given to seek appellate review of the disposition of the federal element in the action.

Section 1314. The pattern of venue in federal question cases is essentially the same as that in diversity cases under § 1303. The place of events or location of property in suit is the basic venue provision, and it is made feasible by permitting nationwide service of process in federal question cases. If there is only one defendant or all defendants reside in the same state, the defendants' residence is an alternate venue open to the plaintiff. If the events are foreign-based and there are defendants resident in different states, venue may be laid where any defendant is found. The objective is that no federal question case be denied a forum because of restrictive rules of venue or process. The many special venue provisions elsewhere in the Code are left untouched, but most of them might well be repealed in the light of this section.

Section 1315. Provision is made for change of venue without restriction except for satisfying the convenience and justice standard. An action commenced in an improper venue may be transferred to a proper one, and the court is empowered to assess costs and attorney's fees to compensate the defendants for expenses attributable to the failure to institute the action in a proper venue. In the unusual case where the interest of justice requires it, an action brought in the wrong venue may be dismissed.

Chapter 86—Admiralty and Maritime Jurisdiction.

Section 1316. The admiralty jurisdiction is not significantly changed. The decision was to keep the traditional language of 28 U.S.C. § 1333 so as to preserve the body of case law built upon it, rather than to embark upon an attempt to draw new and more logical jurisdictional lines. A departure from this approach is made by including a provision that the jurisdiction does not include a claim merely because it arose on navigable waters, thus resolving an uncertainty in the cases. The famous "saving to suitors" clause, dating back to 1789, is replaced by a provision declaring in terms when jurisdiction is exclusive and when it is concurrent; but the line drawn reflects the existing case law construing the saving clause.

Section 1317. Removal of admiralty and maritime actions is permitted, as under existing law, only if there is some basis for federal jurisdiction other than the maritime nature of the claim. The recommended limitations on the invocation of diversity jurisdiction would keep in the state court some admiralty cases now removable. There is also a provision, similar to that in § 1312, for retaining in the federal court a case within the exclusive jurisdiction of the federal courts that was mistakenly brought in a state court and removed to a district court. Under present law the lack of state-court jurisdiction would require dismissal after removal to a federal court of an action that could have been properly instituted in that court.

Section 1318. This section puts into statutory form for the first time rules of venue for actions within the admiralty and maritime jurisdiction. Heretofore such proceedings have been governed by their own distinctive nonstatutory rules. This codification reflects the traditional liberality of venue in admiralty. Action may be brought where events giving rise to the claim occurred, or where any defendant or any vessel, cargo, or other property subject to arrest or attachment may be found. Service of process in personam in any district is authorized. Service of process of arrest or attachment of a vessel, cargo, or other property is limited to the district where the action is brought. If arrest or attachment is made in waters that form or include the boundary between two districts, it may be deemed to have been made in either of such districts. General adoption of this rule is a practical necessity in admiralty. The present code contains some limited provisions to this effect.

Section 1319. This section provides for jury trial if diversity or a federal question furnishes an independent basis of federal juris-

diction and a right to jury trial would otherwise exist. It also provides for jury trial on demand on all claims within the admiralty and maritime jurisdiction in a federal court, other than limitation of liability proceedings, when the relief sought is money damages for personal injuries or death. Under present law, an injured longshoreman may sue on the "admiralty side" of the federal court and have no jury, or, if diversity is present, he may sue on the "law side" and have a jury. The proposed limitations on diversity jurisdiction do not bar such plaintiffs from the federal court, but they do reduce the possibility of a jury trial there. It is believed that actions for a maritime injury or death are the appropriate business of the federal courts and that a plaintiff should not have to choose between a federal forum and a jury trial when it is possible to provide both.

Chapter 87—United States as a Party.

Section 1321. This section, derived from 28 U.S.C. § 1345, makes a general grant of jurisdiction over actions brought by or on behalf of the United States. It also resolves conflicts in the case law with respect to counterclaims against the United States. Counterclaims may be asserted if the defendant has a claim against the plaintiff: (1) of which the district court would have jurisdiction in an independent action; (2) arising out of the same transaction or occurrence as the plaintiff's claim, if it is within the jurisdiction of any court of the United States (e. g., in a suit on a contract, a counterclaim on the same contract is within district court jurisdiction although an independent action for that amount could be brought only in the Court of Claims); (3) arising out of the same transaction or occurrence on which the United States could not be sued in any court, but here the use is only defensive; no affirmative judgment for the defendant can be rendered.

Section 1322. This section deals with cases in which the United States is defendant. Based generally on 28 U.S.C. § 1346, it carries forward jurisdiction in Tucker Act suits, tax refund cases, and cases under the Federal Tort Claims Act. It is proposed, however, that the limit in Tucker Act suits in the district courts be raised to \$50,000, rather than the \$10,000 presently provided. There is also a general grant of jurisdiction over all other actions in which the United States has consented to be sued in a district court. The United States or any agency thereof is given the right to remove any state court action in which it is named as a

defendant. The United States is also allowed to assert as a counterclaim any claim that it has against any plaintiff to the action.

Section 1323. This section gives district courts original jurisdiction of any civil action commenced by a present or former officer or employee of the United States to recover damages for any injury to him on account of any act done under color of his office or in performance of his official duties. This is a broadening of 28 U.S.C. § 1357, which is limited to revenue cases and voting rights cases. The section also includes without change 28 U.S.C. § 1361, giving jurisdiction over actions in the nature of mandamus to compel an officer of the United States to perform a duty owed to the plaintiff. Finally, 28 U.S.C. §§ 1442, 1442a, allowing removal of civil actions or criminal prosecutions brought in a state court against federal officers, are preserved in a somewhat more generalized form.

Section 1324. This section deals with jurisdiction of actions involving federal corporations and national banks. It is based on 28 U.S.C. § 1349 and 28 U.S.C. § 1348.

Section 1325. Jurisdiction over Interstate Commerce Commission orders is continued without any change of substance from 28 U.S.C. § 1336.

Section 1326. The venue provisions for cases to which the United States is a party are generally similar to those for diversity and federal question cases. Suit may be brought at the place of the events or at the place of residence of any defendant other than the United States. In cases brought by private parties the state of residence of all plaintiffs furnishes a proper venue. Actions in rem may be brought only in a district in which the property involved is located in whole or in part. This proposal differs slightly from existing law with regard to suits against officers and agencies of the United States, which may now be brought at the plaintiff's residence only if no real property is involved in the action. This limitation would be removed except with respect to actions in rem, which must be brought where the property is located irrespective of other venue provisions. Special rules of venue are carried forward from present law for tax refund cases, actions involving national banks, and actions involving Interstate Commerce Commission orders. Nationwide service of process is permitted. As in federal question cases, this is a necessity if venue at the place of the events is to be feasible.

Section 1327. Flexibility is provided as to change of venue to a more convenient forum and transfer to a proper court of an action brought in the wrong venue, thus following the pattern for

diversity and federal question cases. Transfer is also permitted of an action erroneously commenced in a court of the United States to another court of the United States that has exclusive jurisdiction of such action. This is a generalization of the principle of 28 U.S.C. § 1406(c), which applies only to the Court of Claims.

Chapter 88—Stays in Certain Cases; Three-Judge Courts

Section 1371. This section continues the principle of the Tax Injunction Act, 28 U.S.C. § 1341, which forbids district courts from enjoining, suspending, or restraining collection of state taxes. The prohibition is extended to include in terms declaratory judgment actions, a codification of present requirements of case law. The Johnson Act, 28 U.S.C. § 1342, is also continued, but its bar of injunctions against state public utility rate orders is broadened to cover orders of state administrative agencies involving natural resources, in which there is a particularly strong local interest. The section also puts in statutory form the "abstention" doctrines permitting under prescribed conditions the stay of a federal action on the ground that it presents issues of state law that ought to be determined in a state court. The conditions are (1) that the state law issues cannot be satisfactorily determined in the light of state authorities; (2) that abstention is warranted because a decision contrary to the view of state law that the state court might ultimately take would result in the needless determination of a substantial constitutional question or would seriously embarrass the effectuation of state policies, or by other circumstances of like character; (3) that a plain, speedy, and efficient remedy may be had in the state court; and (4) that claims of federal right, including any issues of fact material thereto, can be adequately protected by review of the state court decision by the Supreme Court of the United States. In all of these situations where a stay is granted in deference to a state, the federal court may give interim relief to prevent irreparable harm and may vacate its stay and proceed to judgment if the state remedy proves ineffective. Otherwise, however, the action proceeds to judgment in the state courts, with review, if any, in the Supreme Court of the United States. The section also allows a court of the United States to certify questions of state law to the highest state court if the state has an established procedure for answering such questions. Certification is permitted only if the state law question may be controlling in the action and cannot be satisfactorily determined in the light of state authorities; and the court must expressly find that certification will not

cause undue delay or prejudice to the parties. Abstention except as provided in this section is forbidden, but existing discretion as to entertaining declaratory judgment actions and declining relief for want of equity is continued. The section is made inapplicable to actions to redress the denial of the right to vote, or of equal protection of the laws, on the ground of race, creed, color, or national origin. It is also inapplicable to actions brought by or on behalf of the United States.

Section 1372. This section restates the existing Anti-Injunction Act, 28 U.S.C. § 2283, as it has been interpreted by the courts. Of the seven stated exceptions to the ban on injunctions to stay state court proceedings, most are either covered in terms by the present statute or recognized by case law although not so covered (as when the injunction is sought by the United States or an officer or agency thereof). The section permits the federal court to preserve the status quo temporarily while it is determining whether an injunction is otherwise permissible. This power may well be inherent, but it is thought preferable to spell it out in specific terms. There is also a clause designed to permit injunctions to restrain criminal prosecutions in certain civil rights cases where the very existence of a state prosecution may have a chilling effect on others who wish to exercise rights guaranteed by the Constitution of the United States. To this end an injunction is allowed when the statute or other law that is the basis of the prosecution plainly cannot constitutionally be applied to the party seeking the injunction or when the prosecution is so plainly discriminatory as to amount to a denial of the equal protection of the laws. Even if a case falls within one of the stated exceptions, an injunction may issue only if "otherwise warranted," thus making applicable the usual equitable requirements of irreparable harm and no adequate remedy at law.

Section 1373. This section puts in statutory form a judge-made limitation on the power of state courts to enjoin federal proceedings. One exception, presently recognized in the cases, is to allow an injunction when necessary to protect the jurisdiction of the court of property in its custody or under its control. The other exception is when the injunction is necessary to protect against vexatious and harassing relitigation of matters determined by an existing state court judgment. Ordinarily, such an injunction is not necessary because a plea of res judicata in the federal action will give full protection. Here, as in the preceding section, the exceptions stated are conditioned on an injunction being "otherwise warranted."

Section 1374. This section continues the existing requirement of 28 U.S.C. § 2281 for a three-judge court in cases attacking the constitutionality of a state statute or administrative order. The requirement is extended to actions for a declaratory judgment instead of restricting it to proceedings for an injunction. The defendant must ordinarily make a prompt request if he wishes a three-judge court, thus negating the proposition that the three-judge requirement is jurisdictional and nonwaivable. The section also calls for a three-judge court when otherwise required by Act of Congress. A provision requiring a three-judge court only when the statute or order in question is of general applicability reflects the case law, as does the inclusion of a challenge to the constitutionality of a state constitutional provision. It is proposed to repeal the provisions for a three-judge court in cases challenging the constitutionality of an Act of Congress, 28 U.S.C. § 2282, and in T.V.A. condemnation cases, 16 U.S.C. § 831x.

Section 1375. This section deals with the composition and procedure of three-judge courts. It is similar to 28 U.S.C. § 2284. It recognizes that the judge to whom the request is made must determine for himself whether a three-judge court is required before notifying the chief judge of the circuit. The powers of a single judge in a case within the three-judge requirement are defined; they are similar to his powers under the present statute. He may enter a temporary restraining order on making a finding that irreparable damage will otherwise result, but he may not pass upon an application for a preliminary injunction. Nor may he order abstention in a case within the three-judge court statutes; this is in accord with present case law. Any action of a single judge may be reviewed by the full court at any time before final judgment.

Section 1376. This section deals with appellate review. It is designed to simplify and clarify the law which at present is so confusing that the cautious lawyer is likely to follow the safe course of filing his appeal in both the Supreme Court and the court of appeals. The courts of appeals are given jurisdiction to review decisions of district courts refusing to convene or dissolving such a court. If no timely request is made or if no appeal is taken from the denial of such a request, the power of the single judge to act is not thereafter open to question. The present rule to the contrary is supported by the language of the statute and by the cases. Appeal from decisions on the merits by three-judge courts is directly to the Supreme Court. If the Supreme Court determines that a three-judge court was not required by law, or if the order of the three-judge court was one appealable to the

court of appeals, the Supreme Court may remand the case to the appropriate court of appeals. It has discretion, however, to proceed itself to hear and determine the appeal. Provision is also made for certification to the Supreme Court of appeals erroneously taken to the court of appeals.

Chapter 89—Procedure for Removal

Section 1381. This section continues the existing practice of initiating removal by filing a petition with the federal court. It is similar to 28 U.S.C. § 1446, but the requirement of verification of the removal petition is omitted. Instead it is provided that the petition shall be certified as in the case of a pleading, thus bringing into play the attorney's voucher for what he is signing, as set forth in Fed.R.Civ.Proc. 11. The present requirement for a removal bond is dropped in the belief that it is a nuisance and an expense to the defendant, and that it gives no substantial protection to the plaintiff. It is provided that the "grounds" for removal be stated, rather than the "facts," as specified in the present law. In general diversity cases a denial of the facts that would bar invocation of the district court's jurisdiction under § 1302 is required, and in multi-party multi-state diversity cases certain additional statements must be made showing that removal is permissible. Notice of removal must be given to all parties, rather than only to "adverse parties" as under the existing statute. The sum demanded in good faith in the state court pleading ordinarily determines the amount in controversy, but it may be set forth in the removal petition (1) when the relief demanded is not limited to a money judgment, and (2) when the state practice either does not require demand for a specific sum or permits recovery of damages in excess of the amount demanded in the pleading. Under § 1382 the time for removal does not begin to run until it appears in the state court proceedings that more than \$10,000 is being sought. The defending party need not wait, however, until it so appears. He may remove immediately if he has information from which he can allege in good faith that the jurisdictional amount is really involved.

Section 1382. This section deals with the time for removal. It is drawn generally from 28 U.S.C. § 1446(b). Removal must be within thirty days but, several different points are provided from which the time runs so as to meet the variety of proceedings used in the states for commencement of an action. When removal is founded on a later pleading than the complaint, the petition must be filed within thirty days after service of that pleading.

Removal is also permitted on the basis of an amended pleading that first makes the case removable. The opposing parties are given thirty days to remove after the amendment, but the amending party must remove within thirty days of his original pleading. If the pleading is amended during trial or within thirty days prior thereto, failure to remove without undue delay is a waiver of the right of removal. Where state practice does not require demand for a specific sum or permits recovery in excess of the demand, removal may be effected whenever the party against whom the demand is made can allege in good faith that more than the requisite amount is in controversy. He is required to act not later than thirty days after it appears in the state court proceeding that damages of more than \$10,000 may be awarded. If it so appears during trial or within thirty days prior thereto, removal may be had only if the district court finds that the party claiming damages has deliberately failed to disclose the amount of damages in order to defeat removal. A criminal prosecution, as under 28 U.S.C. § 1446(c), may be removed at any time before trial, as may a civil action of which the courts of the United States have exclusive jurisdiction. Notifying the other parties of removal and filing a copy of the petition with the state court need not be done within the time provided for filing the removal petition, but removal is not effective until those steps have been completed. If a party seeks dismissal in state court on the ground of inconvenient forum, the period from the making of the motion until the seventh day following decision of the state trial court is excluded in determining the time for removal.

Section 1383. The procedure after removal is not greatly changed. The provision that after removal is effective the state court shall proceed no further is modified to allow completion of a trial in progress at the time of removal. Under present law the removing party may cause the trial to be abortive, however unjustified the removal may be. It is here proposed that the state court may in its discretion complete the trial. If it determines to proceed to verdict, judgment can then be entered on the verdict, if the case should thereafter be remanded. If the removal turns out to be proper, the verdict of course becomes a nullity. This problem will rarely arise, but the proposed procedure should prevent the tactic of removing without warrant simply to force a new trial after the inevitable remand.

Section 1384. This section covers remand to the state court. The present law, 28 U.S.C. § 1447(c), calling for remand when it appears that a case was removed improvidently and without jurisdiction is retained subject to a qualifying reference to § 1386,

which deals with foreclosure of jurisdictional issues. Award of a reasonable attorney's fee is also permitted. An order remanding a case to the state court has traditionally not been reviewable "on appeal or otherwise." That rule is here qualified by reference to certain exceptions. First, as provided in a proposed new § 1292(c), a remand order is reviewable on appeal if the district court and the court of appeals grant leave on a determination that there is sufficient ground for difference of opinion to warrant an appeal. Request for such leave must be initiated within ten days. This procedure, requiring the concurrence of both courts, is similar to that for interlocutory appeals under 28 U.S.C. § 1292(b). It is also made available for orders staying a federal action under § 1305 or § 2373 or refusing to dissolve such a stay. Second, pursuant to § 1313, leave may be sought from the court of appeals to appeal from an order disposing of the federal element in a removal case and remanding the state issues. A ten-day stay of the remand order is given to allow an application for such leave. Third, an appeal of right from an order remanding civil rights cases removed under § 1312(c), first provided in the Civil Rights Act of 1964, is continued, but with a time limit of ten days.

Chapter 90—Raising and Foreclosure of Jurisdictional Issues.

Section 1386. This section has no counterpart in existing law. It provides that if issues of subject-matter jurisdiction are not properly raised at an early stage of the proceedings, consideration of such issues by a trial or appellate court is foreclosed. The cutoff date adopted is the commencement of trial on the merits or the rendering of any prior decision that is dispositive of the merits (such as dismissal for failure to state a claim). The sole exceptions to this rule are instances in which: (1) the court has expressly deferred resolution of the question; (2) the relevant facts could not with reasonable diligence have been discovered earlier by the party raising the issue, or where there has been a change in the applicable law; (3) collusion or connivance is established; (4) the question arises on review or reconsideration, on the record already made, of a decision with respect to that question not rendered contrary to the provisions of this section (this would embrace such writs as mandamus and prohibition, as well as appeal and a motion for reconsideration in the trial court); or (5) consideration of a jurisdictional effect at that stage of the proceedings is required by the Constitution. It is

further provided that any governing statute of limitations is tolled by the commencement of an action in a federal court, and for at least thirty days following dismissal (if within that period the action is commenced in a proper court), in any case in which the dismissal was for lack of jurisdiction. This provision is designed to deprive defendants of one of the principal reasons for delay in raising jurisdictional issues. Finally, if a party has commenced a timely action in state court that is dismissed because it is within exclusive federal jurisdiction, this section specifies that the statute of limitations will not bar commencement of a new action on the claim in federal court within thirty days after dismissal of the state action.

Chapter 160—Multi-Party Multi-State Diversity Jurisdiction.

Section 2371. The district courts are here given original jurisdiction of any action in which defendants necessary for a just adjudication are so dispersed as to be beyond the reach of any one territorial jurisdiction, so long as there is minimal diversity of citizenship among the parties. The definition of necessary defendants embraces persons in whose absence complete relief cannot be accorded the plaintiff. This includes, but is not limited to, those in whose absence the plaintiff could not maintain the action, but excludes joint tortfeasors or others against whom joint-and-several or alternative liability is asserted. The determination of whether defendants are within the reach of process of a jurisdiction is made by reference to stated objective factors rather than by factual inquiry as to whether each might with diligence have been found there.

Section 2372. Venue of original actions under § 2371 is limited to those federal districts having substantial contacts with the subject of the action. Except where all relevant events and property are outside the United States, venue is not authorized in terms of the residence of parties. This is not necessary because, as set forth in § 2374, federal process in these actions can summon parties from wherever they may be reached.

Section 2373. Removal jurisdiction is granted whenever a defendant sued in a state court is unable to bring in additional persons necessary for a just adjudication as to that defendant. The criterion on removal is whether those needed persons can be brought into the state court where the action is pending. A per-

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son is necessary for a just adjudication as to a defendant if he claims or may claim an interest in the property or transaction that is the subject of the action and is so situated that disposition of the action without him might leave the defendant subject to likely double, multiple, or otherwise inconsistent obligations. A person is not thus necessary merely because of his liability to a defendant for all or part of the plaintiff's claim against him. Removal is authorized when a counterclaim is asserted in a state court and additional persons necessary for a just adjudication cannot be brought into that court. As a guard against abuse of the jurisdiction, the removing party is required to certify expressly that all reasonable efforts have been made to bring the additional necessary parties into the state court. For similar reasons, where another state court is available to entertain the full action and is the forum where it ought to be litigated, the district court may stay its proceedings in favor of an action in that state court. Such a stay order is subject to the limited appellate review referred to in the discussion of § 1384.

Section 2374. This section outlines the basic mode of proceeding in actions under this chapter. The district court may issue its process for all necessary parties wherever they may be that the process of the United States can reach. Free transfer in the interest of convenience and justice to any other district is authorized, either on motion by a party or on the court's own motion. It is also provided that in selecting the applicable state law, the district court need not automatically follow the choice-of-law rule of the state in which it happens to be sitting (or of any other particular state). It is thought not to be reasonable to require a federal court to follow the state choice-of-law rule in a situation where by hypothesis the court of that state could not itself reach by its process the parties brought into the district court only by the force of federal power. An action under this chapter may continue where a necessary party as here defined cannot be served with process unless the district court concludes that such continuation would work greater injustice than total failure of the action. When the smallness of the amount in controversy, compared with the distances over which parties may be compelled to respond, may result in injustice being inflicted simply by prosecution of the action, the court has discretion to dispense with the presence of absentees or to discontinue the action entirely. This provision is limited to cases where the adverse effect on any party does not exceed \$5,000. An order to proceed with an action in the absence of parties ordinarily considered necessary may be conditioned upon appropriate measures

to protect affected interests. The fact that an absent party is one who would ordinarily be deemed "indispensable" to the action does not require dismissal.

Section 2375. This section furnishes definition of various terms used in this chapter and in establishing jurisdiction of interpleader actions.

Section 2376. This section provides for extending this chapter (specifically § 2374) to actions already in federal court under other jurisdictional grants, in which necessary parties to either an original action or a counterclaim are absent beyond the reach of normal process.

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RESTRUCTURING FEDERAL JURISDICTION: THE AMERICAN LAW INSTITUTE PROPOSALS

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Ten years ago this month, in the course of his annual address to the American Law Institute, Mr. Chief Justice Warren said that it is essential that we achieve a proper jurisdictional balance between the Federal and State court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism.¹

He called on the Institute to undertake a study defining, in the light of modern conditions, what the jurisdiction should be of the two systems of courts.² The Institute, of course, was glad to accept the task suggested by the Chief Justice, and in the intervening years much of the time and energy of the Institute has been devoted to this project. At the Annual Meeting in May, 1968, the lawyers and judges and professors who make up the Institute voted final approval of the recommendations submitted to them. The Reporters have since done the necessary editorial revision, and ten days from today, when Chief Justice Warren appears for the last time to address the Institute as Chief Justice, he will be presented with the final official draft of the Institute's *Study of the Division of Jurisdiction between State and Federal Courts*.³

Chief Justice Warren's proposal that a study of this kind be made was a wise one. The United States is virtually unique in having two independent systems of courts throughout the country, with one deriving its authority from the national government while the other

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¹36 ALI PROCEEDINGS 33 (1959).

²*Id.* at 34.

³STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Official Draft 1969) (hereafter referred to as STUDY).

is the creation of the constituent members of the federal union. At the Constitutional Convention and in the ratification debates the concept of lower federal courts was vigorously resisted.⁴ They were created, however, by the Judiciary Act of 1789, and, though there are occasional suggestions even today that a single unified system of courts would be a better idea,⁵ it seems safe to assume that an institution that has existed for 180 years is likely to prove permanent. But though we have come to accept the idea of state and federal courthouses a block from each other, and of courts with jurisdiction that often overlaps, there had not been, until the Chief Justice made his suggestion, any comprehensive attempt to justify the division of functions between the two systems in terms of principles of federalism.

Indeed the jurisdiction presently vested in the federal courts is the result of statutes enacted at various times in our history with various specific purposes in mind. The present jurisdictional pattern was heavily influenced by the tragic events that culminated very near to here at Appomattox Courthouse.⁶ And the last major change in the structure of the federal courts was the Judges' Bill of 1925,⁷ a statute that is older than I am.

It is, of course, perfectly possible that, despite their age and the episodic nature of their origins, the present statutes provide for the wisest and best possible allocation of judicial business between state and federal courts. But if this should be the case, it would be a striking proof of Hamlet's assertion that "there's a divinity that shapes our ends, rough-hew them how we will."⁸ As we shall see, it was the conclusion of the American Law Institute that we have not been so fortunate, and that much improvement is possible.

CRITERIA FOR ALLOCATING JURISDICTION

What criteria are there to test the appropriateness of an allocation of jurisdiction between state and federal courts? I suggest that there are four.

First, is the division rational? There ought to be some better basis

⁴C. WRIGHT, *FEDERAL COURTS* 2-3 (1963).

⁵Anderson, *The Line Between Federal and State Court Jurisdiction*, 63 MICH. L. REV. 1203 (1965); Anderson, *The Problems of the Federal Courts—and How the State Courts Might Help*, 54 A.B.A.J. 352 (1968).

⁶Wright, *The Federal Courts—a Century After Appomattox*, 52 A.B.A.J. 742 (1966).

⁷Act of Feb. 13, 1925, 43 Stat. 936.

⁸*Hamlet*, act V, scene ii, line 10.

for allowing a federal court or a state court jurisdiction over a particular kind of case than that it has been done that way in the past.

Second, is the division clear? This is similar to what the late Professor Chafee called the Bright Line Policy.⁹ A lawyer of reasonable ability should be able to read the statute and tell with fair assurance whether a particular court has jurisdiction of his case rather than being trapped by ambiguous language into bringing his case in the wrong court.

Third, is the division consistent with efficient judicial administration? We live in an age in which most courts, state and federal, have congested dockets, and this situation is likely to become even more grave. Jurisdictional allocations cannot reduce the burden of the case-load on the entire system. The case must ultimately be heard in some court. But the jurisdictional allocation should not aggravate these burdens by permitting extensive preliminary litigation to decide where the case is to be heard, or by requiring wasteful duplication of proceedings from a single controversy in both systems of courts, or by shuttling the litigants in a particular case back and forth between the two systems.

Fourth, is the division designed to reduce friction between the two systems? In a federal system there will always be conflicts between the national government and the state governments, and between the judicial systems they have created, but the jurisdictional division should not provide unnecessary occasions for conflict.

The four matters to which I have referred are criteria for evaluation. They are not categorical imperatives. So long as we have two systems of courts, we are going to have some measure of irrationality, unclarity, inefficiency, and friction. Indeed these criteria at times point in different directions. If, for example, the jurisdictional line is painted in bold, clear strokes, it is likely to leave on one side of the line particular cases that more rationally should be placed on the other, yet the nicer distinctions a truly rational allocation would suggest can only be made by a statute that is less clear, either because of the complexity of its provisions or because it states matters very generally and leaves much to particularized determinations in individual cases. Indeed my four suggested criteria remind me somewhat of the test recently announced for determining the validity of a congressional apportionment. We can never fully satisfy these criteria, just as we can never have absolute mathematical equality in an apportionment,

⁹Z. CHAFEE, *SOME PROBLEMS OF EQUITY* 311-16 (1950).

but we are entitled to demand that some justification be shown for any deviation from these.¹⁰

Anyone who is familiar with the present jurisdictional pattern must surely recognize that there are many respects in which it is seriously defective when measured by these proposed tests. Only a few examples need be given for each of the four tests to illustrate the point.

Take first the test of rationality. Suppose that while I am in Lexington this weekend the car I am driving collides with Dean Steinheimer's car, and each of us is seriously injured. He is a citizen of Virginia and I am a citizen of Texas, so that there exists between us that ancient ground for federal jurisdiction, "diversity of citizenship." I can sue Dean Steinheimer in the federal court for the Western District of Virginia, on the theory, accepted since 1789 but in recent years heavily challenged, that a Virginia state court might be prejudiced against me because I am from far away while the dean lives here. So far so good—at least for those who accept the theory that a Virginia state court might be prejudiced against a Texan while a federal court in Virginia will be free from such prejudice. Suppose however that I am not worried about prejudice and I choose to sue in state court. Even though there is still diversity between us, Dean Steinheimer cannot remove the case from state to federal court. If I am willing to take my chances with the state court, the dean, as "a citizen of the State in which such action is brought,"¹¹ is not given any choice in the matter. This still fits with the theory and is a rational pattern. But now suppose that the dean wins the race to the courthouse, and he brings suit against me before I can sue him. He may sue in the state court if he wants to—but he is also free to commence his action in federal court if he prefers. Perhaps there is some reason why a local citizen should be allowed to invoke federal jurisdiction in a suit against someone from out of state, but I have yet to understand what that reason is.

Let me give one other example of the irrationality of the present pattern. Suppose that I think that state officials are denying me the right to vote, or the right of freedom of speech, or one of the other great rights secured by the Constitution of the United States. I can sue those state officers in federal court. It does not matter how small my claim may be, or that it cannot even be valued in money.¹² But

¹⁰*Cf. Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).

¹¹28 U.S.C. § 1441(b) (1964).

¹²28 U.S.C. § 1343 (1964); *Hague v. CIO*, 307 U.S. 496, 518-532 (1939) (Stone, J., concurring).

imagine that my claim is against federal officers rather than state officers. In that case the door of federal court will be open to me only if my claim is for more than \$10,000.¹³ Judge Medina has recently referred to this as "an unfortunate gap in the statutory jurisdiction of the federal courts . . ."¹⁴ It is indeed unfortunate, and it is almost certainly a mere happenstance of history rather than the result of a conscious choice. But a rational pattern of federal-state jurisdiction should be based on conscious choices rather than happenstances.

Many more examples could be put, but those are enough to suggest the lack of rationality of the present allocation. I turn now to clarity and Professor Chafee's Bright Line Policy. A labor union brings pressure to bear on an employer to have it fire its mine superintendent. The superintendent wants to collect damages from the union. He has two grounds on which to bring such a suit. He claims that the union is guilty of a secondary boycott, in violation of the Taft-Hartley Act, and also that the union has been guilty of a conspiracy in violation of state law. Clearly the Taft-Hartley Act claim "arises under the . . . laws . . . of the United States" and can be heard in federal court.¹⁵ Can the state law claim be joined with it—assuming there is no diversity—or must it be the subject of a separate suit in state court? The statutes are silent. There is a statute saying that a person who has a claim under the copyright, patent, or trademark laws may join with it "a substantial and related claim"¹⁶ of unfair competition but this, of course, has no application on the facts I have given you. The Supreme Court, however, has held that the statute about copyrights and patents is merely a particular application of something called "pendent jurisdiction." Whenever there is a state claim joined with a federal claim, the federal court has power to decide the whole case provided the two claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."¹⁷ I think this is a good rule, but one should not have to search the United States Reports in order to find it, and it is especially unfortunate that the statutes are affirmatively misleading by seeming to confine the principle much more narrowly.

Let me give one other example of lack of clarity. Suppose that a railroad has settled a claim against it some years back by agreeing

¹³28 U.S.C. § 1331(a); *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968).

¹⁴*Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817, 826 (2d Cir. 1967).

¹⁵28 U.S.C. § 1331(a) (1964).

¹⁶28 U.S.C. § 1338(b) (1964).

¹⁷*United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

to give the claimant an annual pass for the rest of his life. Then Congress passes a statute barring railroads from giving free passes. The railroad is in a quandary. It wants to honor its contract but it also wants to obey the law. Does the statute about free passes apply where there is an existing contractual obligation to give the passes? If it does apply, is it unconstitutional since it takes away a property right of the person who would otherwise be entitled to a pass? The railroad's lawyers come up with a solution. They will bring an action for a declaratory judgment and find out from the courts what they should do in these circumstances. Can they bring this action in federal court, assuming that there is no diversity? It would seem that they should be able to do so, since the only issues in the case are issues of the meaning and constitutionality of an Act of Congress, just the kind of issues that a federal court is best qualified to hear. The average intelligent lawyer is likely to believe not only that the railroad should be able to sue in federal court but that it can do so. The suit looks like a case "arising under" the Constitution and laws of the United States, and thus to be within "federal question" jurisdiction. And the lawyer who knows that the courts have put a gloss on that statute, and have held that the federal question must appear on the face of the well-pleaded complaint, is still not likely to perceive any obstacle. The complaint in the declaratory judgment action states, as it must, a claim based directly on federal law. Despite all of this, the answer probably is that the case must be brought in state court. I say "probably" because no one can be absolutely sure of the answer until the case is actually decided. But there is strong language from the Supreme Court warning against using "artful pleading" to permit a suit that could not otherwise be heard in federal court to be brought there under the guise of an action for a declaratory judgment.¹⁸

What this appears to mean in my hypothetical case is that it is not enough for federal jurisdiction that the well-pleaded complaint presents a federal question. Instead we must turn the clock back to the days before 1934, when there was no such thing as a suit for a declaratory judgment in federal court. In those days the controversy between the railroad and the man who wanted a pass would not have been heard in federal court. The only way the case could get to court at all would be for the man to bring a suit against the railroad to require it to give him his pass. That suit, the Court held years ago, was not properly brought in federal court, since a claim for

¹⁸*Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-674 (1950). See C. WRIGHT, *FEDERAL COURTS* § 18 (1963).

breach of contract is a state law claim, and the federal question entered only through the defense of the railroad that the new statute makes it unlawful for it to perform its contract.¹⁹ Since the case could not have come to federal court prior to 1934, we must resort to this ancient history to bar it from federal court today, even though we now have available an action for a declaratory judgment, something we did not have in the old days.

My third test is efficiency of judicial administration. Here the present allocation gets very bad marks. Cases do shuttle back and forth from one system to the other, often for as many as 10 or 12 years. There is extensive preliminary litigation to decide in which court a case will be heard. And there is a significant amount of duplication of litigation arising out of a single controversy in the two systems. I will cite two particularly egregious examples. Suppose an action is brought in federal court in which plaintiff alleges that he is a citizen of Florida and the defendant is a citizen of Kentucky. Defendant files an answer admitting the allegation of the citizenship of the parties and expressly agreeing that the federal court has jurisdiction. Defendant then takes depositions and occupies the time of the court with various pre-trial motions. At a point when the court has indicated it is going to decide the case for the plaintiff, and perhaps even when the statute of limitations would bar a new suit in state court, defendant files an amended answer. In the new answer he denies that he is a citizen of Kentucky, and alleges instead that he is, and at all times has been, a citizen of Florida, so that the federal court lacks jurisdiction. The court agrees, and orders the federal action dismissed.²⁰ This hardly seems to meet the test of common fairness, to say nothing of the test of efficient judicial administration, and yet the rule in federal court has long been that if at any stage of a case it appears that there is no federal jurisdiction, the action must be dismissed.

Ordinarily one or both of the parties have a choice about whether a case that could be heard in federal court shall be heard there, and, as in my suit against Dean Steinheimer, may opt for a state forum if they prefer. This is not always true, since there are some kinds of cases that Congress has said may only be heard in a federal court, that are, in the customary phrase, within "exclusive federal jurisdic-

¹⁹*Louisville & N. R.R. v. Mottley*, 211 U.S. 149 (1908).

²⁰*Page v. Wright*, 116 F.2d 449 (7th Cir. 1940); *Knee v. Chemical Leaman Tank Lines, Inc.*, 293 F. Supp. 1094 (E.D. Pa. 1968); cf. *Ramsey v. Mellon Nat'l Bank & Trust Co.*, 350 F.2d 874 (3d Cir. 1965). But cf. *Di Frischia v. New York Cent. R.R.*, 279 F.2d 141 (3d Cir. 1960).

tion." Imagine that we have one of these cases, but that plaintiff does not realize that there is no choice about it, and he sues in state court. At some later point one or both of the parties realizes the mistake, and undertakes to remove the case to the federal court where it should have been all along. Strangely—indeed incredibly—the federal court cannot hear the case. Even though the case has now been brought to the only court with jurisdiction to hear it, it is required to dismiss the case, since the state court from which the case was removed had no jurisdiction and therefore, so it is said, there was no pending case that could be removed.²¹ If someone were deliberately undertaking to devise the least efficient possible court system, this would be a pretty good rule to adopt. To the rest of us it must smack of Alice in Wonderland.

On the fourth of the proposed tests, avoiding unnecessary friction between the two court systems, the present rules come off better than they do on the first three tests, but they still could be better than they are. Why should federal courts be allowed to enjoin proceedings in a state court under a statute so general and open-ended that it is insignificant as a limitation on federal court power²² while a state court cannot enjoin federal court proceedings even to protect against vexatious and harassing relitigation of matters previously determined by the state court?²³ Why should it be possible for a litigant to bring a state court action to naught by filing a frivolous petition for removal just before the case is submitted to the jury in the state court?²⁴ Why should a state court be asked to decide questions of state law in a case while being told that it is not to pass on the federal issues, and that the parties plan to return to federal court for the ultimate decision of the case?²⁵

THE LAW INSTITUTE PROPOSALS

For the last decade the American Law Institute, in response to the request of the Chief Justice, has been examining the present jurisdictional statutes from the point of view of the four tests I have suggested, and has been attempting to devise statutory solutions that will cure the specific anomalies and deficiencies I have mentioned, as well as many more. The end result, the volume that will be presented

²¹*E.g.*, *General Investment Co. v. Lake Shore & M. S. Ry.*, 260 U.S. 261 (1922).

²²28 U.S.C. § 2283 (1964).

²³*Donovan v. City of Dallas*, 377 U.S. 408 (1964).

²⁴*See* STUDY 357-360.

²⁵*England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

to the Chief Justice in a few days, is 587 pages long. It includes drafts of statutes that would, if enacted, replace the present chapters of the Judicial Code dealing with jurisdiction, venue, and removal in the federal district courts, and it proposes a great many related changes to other sections of the Judicial Code and of the United States Code generally.

The work has been under the direction of Professor Richard H. Field, of the Harvard Law School, who has been Chief Reporter for the Study since its beginning. Professor Paul J. Mishkin, of the University of Pennsylvania Law School, was Reporter for the portion of the Study dealing with General Diversity Jurisdiction and Multi-Party Multi-State Jurisdiction and, since 1963, I have had the privilege of serving as Reporter for the portions of the Study other than those on which Professor Mishkin worked. We have been greatly aided in the project by a distinguished group of Advisors, including seven federal judges, five practitioners, two state judges, and two law professors. All of our work has had to run the gamut of close scrutiny by the Council of the Institute and again by the members of the Institute at the Annual Meeting. Almost all of the proposals have been before the Council and the Institute in two or more different years, as we have revised our proposals in the light of professional reaction to them. Indeed one particularly difficult section went through eight different drafts, as we struggled to reach a proper formulation. Ten years seems like an inordinate length of time to take for such a Study. In less time than that America has achieved the capability to go to the moon. But the processes of the American Law Institute are deliberate and slow-paced, in the belief that the end product acquires additional strength from the time and care that go into its preparation.

Professor Field has prepared a summary of the Institute's proposals.²⁶ The proposals now go to a committee of the Judicial Conference of the United States for study and possible submission to Congress. The summary, it is hoped, will arouse the interest of the profession and lead lawyers and judges to examine the complete text of the Study so that they may express informed comments on the subject first to the Judicial Conference and then perhaps to the Congress. I do not want to repeat here what Professor Field has done, but I do want to describe what seem to me the more important of

²⁶Field, *Jurisdiction of the Federal Courts—A Summary of American Law Institute Proposals*, 46 F.R.D. 141 (1969).

the proposals, and the reasons that underlie them, before speaking briefly of the controversy they have already aroused.

Diversity Jurisdiction

Undoubtedly the proposals of the Institute with regard to diversity jurisdiction have attracted the greatest public attention. It has been said that this portion of the Study would "emasculate" diversity jurisdiction.²⁷ I put to one side that the dictionary definition of "emasculate"²⁸ seems singularly difficult to apply in this context. Critics can be excused excursions into rhetoric. In truth no one knows what the exact effect will be. Professors Field and Mishkin, who had the responsibility for that portion of the Study, have made a conscientious attempt to analyze the statistical effect of the diversity proposals²⁹ but the imperfect nature of the existing statistics and the assumptions that must be made about how litigants will react under a very different jurisdictional scheme make an extremely rough estimate the best that can be offered. Probably 50% is as valid a figure as any. There were 21,009 diversity cases commenced in or removed to federal court in the fiscal year 1968³⁰ so that there would still be more than 10,000 diversity cases a year even in the "emasculated" jurisdiction.

Fears that cutting diversity jurisdiction in half "would seriously increase the backlog of cases in state courts, with resulting hardship and injustice to litigants" or that they will make "what might be a typical two-year wait in federal court into a three-year wait in state courts"³¹ seem plainly illusory. Ten thousand cases is a drop in the bucket of the litigation now being heard in state courts of general jurisdiction. To reduce diversity in half might increase by 1% the number of cases or of trials in the courts of a typical state³² and even this modest estimate ignores the fact that, as we shall see, the Institute's proposals for federal question jurisdiction look in the direction of allowing access to federal court in many cases that can now only be heard in a state court.

What justification is there for this major reduction in diversity jurisdiction? The answer offered is that it would rationalize the

²⁷Farage, *Proposed Code Will Emascuate Diversity Jurisdiction*, TRIAL, April/May 1966, at 30.

²⁸"1. To castrate; geld. 2. To deprive of masculine vigor of spirit; to weaken." WEBSTER'S COLLEGIATE DICTIONARY 324 (5th ed. 1946).

²⁹STUDY 465-476.

³⁰*Id.* at 468.

³¹*Conflict over Cut in Federal Civil Cases*, TRIAL, Oct./Nov. 1968, at 3.

³²STUDY 473-474.

jurisdictional lines and permit a federal action based on diversity only in those classes of cases with some valid justification for being in the national courts. When I discussed earlier my litigation with Dean Steinheimer—happily entirely hypothetical—I said that the theory of diversity is that a state court may be prejudiced against someone from out of state. Professors Field and Mishkin accept that theory, though they state it rather more elegantly than I did.

The function of the jurisdiction is to assure a high level of justice to the traveler or visitor from another state; when a person's involvement with a state is such as to eliminate any real risk of prejudice against him as a stranger and to make it unreasonable to heed any objection he might make to the quality of its judicial system, he should not be permitted to choose a federal forum, but should be required to litigate in the courts of the state.³³

Thus under the Institute's proposals, I could still sue the dean in the federal court here, since I am a visitor from another state. But if Dean Steinheimer were the one to bring suit, he could not sue me in federal court in Virginia since there is no real risk of prejudice against him as a stranger. Section 1302(a) of the proposals would not permit any person to invoke diversity jurisdiction in a state of which he is a citizen. I confessed to you earlier that I have never understood why the local citizen is allowed to bring suit in federal court, and it seems to me that this limitation is clearly needed.

The same logic suggested to the Reporters for the diversity portions of the Study that businesses that are well established in the state have nothing to fear from the judicial system of the state, and that these too should be barred from invoking the jurisdiction. It is difficult to distinguish this case in principle from that of the local citizen, though the problems of draftsmanship become considerably more complex in dealing with the business. In § 1302(b), the Reporters have attempted an elaborate definition of what they call a "local establishment" and have said that a business may not invoke diversity jurisdiction in a state in which it has maintained a local establishment for more than two years if the suit arises out of the activities of that establishment. The General Motors Corporation, I would suppose, has for many years maintained "local establishments" in many parts of Virginia. It is a major taxpayer and employer here. The proposal of the Institute is that if General Motors is involved in litigation with a Virginia citizen arising out of its Virginia activi-

³³*Id.* at 2.

ties, it should have to do so in the Virginia courts. If, however, the suit arises out of a transaction that took place in some other state, and suit is brought here, the company would remain free to take the case to federal court.

Finally the Reporters carry the principle to its ultimate, if not beyond, in what is known as the "commuter" provision.³⁴ The effect of this, which will be more significant in such metropolitan areas as New York, Philadelphia, and Chicago than it is in Virginia, is that a person who lives, for example, in Newark, New Jersey, and crosses the river each day to work in New York, could not invoke diversity either in New Jersey or in New York.

These are the principal limitations the Institute proposes for diversity, about which, as we shall see, strong controversy has already arisen. There are one or two other limitations, but it is hard to see how there can be opposition to them from anyone except those whose rationalizing principle is that a choice of forum, for whatever reason, is a good thing. Thus the Institute proposes to prevent people from playing games with jurisdiction by using artificial devices either to create or defeat diversity in particular cases.³⁵ The most popular, and least defensible, of those devices has been to have a person—frequently a secretary in the office of plaintiff's lawyer—chosen to act as executor or administrator or guardian in order either to get into or stay out of federal court, as may seem tactically most desirable in a particular case. The Institute proposes that tricks of this kind be barred by a provision that, for purposes of diversity, the citizenship of a representative be deemed to be that of the person he represents. The courts are already edging in this direction,³⁶ but this clear abuse of jurisdiction is better resolved by legislation than by litigation.

Though it has not been much noticed, there are several respects in which the Institute proposes to expand the scope of diversity jurisdiction. The law presently is that a corporation is regarded as a citizen of the state in which it is incorporated and of the state in which it has its principal place of business.³⁷ If it is involved in a lawsuit with a citizen of any state other than these two states, diversity jurisdiction exists. But the rule is very different with a partnership, a labor union, or some other form of unincorporated association. Here

³⁴*Id.*, § 1302(c).

³⁵*Id.*, § 1301(b)(4).

³⁶*McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968); *cf. Kramer v. Caribbean Mills, Inc.*, 89 S. Ct. 1487 (1969).

³⁷28 U.S.C. § 1332(c) (1964).

it is held necessary to look at the citizenship of each of the members of the association, and if any member is a citizen of the same state as the other party to the lawsuit, there is no diversity. Judge Craven, then on the district court bench, thought that such an odd distinction—by which United States Steel can take advantage of diversity jurisdiction but the United Steelworkers cannot—should no longer be applied, but the Fourth Circuit and the Supreme Court, while recognizing the desirability of changing the rule, held that change should come from Congress rather than the courts.³⁸ The Institute's proposal is that an unincorporated association capable of being sued as an entity should be regarded as a citizen of the state in which it has its principal place of business.³⁹ In addition the provision barring a corporation from invoking diversity jurisdiction in a state in which it has a local establishment would apply also to unincorporated associations.⁴⁰ The result is that these two forms of business enterprise would be treated substantially alike.

Another proposed expansion of diversity can be illustrated by my putative suit against Dean Steinheimer. Suppose that my wife is with me in the car, and she is also injured, but that her injuries are comparatively minor, and her claim is only for \$5000. Until very recently it had been thought to be the law that her claim could not be heard in federal court, since less than the \$10,000 required for diversity jurisdiction is in controversy.⁴¹ This means that either we must have two law suits arising from this single accident, with my claim heard in federal court while my wife is compelled to sue in state court, or I must forego my statutory right to bring my claim in federal court. Neither result is appealing. There were notable opinions from the Third and Fourth Circuits in 1968, rejecting the old orthodoxy, and holding that if one plaintiff has a claim for more than \$10,000 others with closely related claims for less than \$10,000 may join in the suit.⁴² Unfortunately in March of this year the Supreme Court handed down a decision that, while not directly in point, casts doubt on whether these sensible decisions can stand.⁴³ The Institute proposals include a provision that, though more limited

³⁸*United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U.S. 245 (1965), *affirming*, 336 F.2d 160 (4th Cir. 1964).

³⁹STUDY § 1301(b)(2).

⁴⁰*Id.*, § 1302(b).

⁴¹C. WRIGHT, *FEDERAL COURTS* 103-104 (1963).

⁴²*Jacobson v. Atlantic City Hosp.*, 392 F.2d 149 (3d Cir. 1968); *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968).

⁴³*Snyder v. Harris*, 394 U.S. 332 (1969).

than I would have preferred, would allow my wife's claim to be joined with mine in the federal action.⁴⁴

Quite commonly it happens that a potential plaintiff will, for tactical reasons, prefer to sue in his own state court and will be apprehensive that the defendant, from out of state, will remove the case to federal court. One way to prevent this is to join a local citizen as a codefendant. Under present law all defendants must be non-residents if there is to be removal.⁴⁵ If there is a good-faith claim against the local citizen the case must be kept in state court, and claims that the joinder of the local man is fraudulent, and was done solely to defeat removal,⁴⁶ are rarely successful and never edifying. The Institute would change this rule and allow any defendant who could have removed if he had been sued alone to do so regardless of what other defendants are joined with him.⁴⁷

One final provision of the diversity sections is worth noting. There was an interesting case a few years ago in which a North Carolina corporation sued for \$1,408.72 in the North Carolina state court. Defendant, a citizen of Virginia, who had suffered substantial injuries from the same transaction, had a claim for \$78,650.00. Under North Carolina law he was required to plead his claim as a compulsory counter-claim in the state court action. He then removed the case to federal court, and it was held that he was allowed to do so.⁴⁸ Surely this result is desirable. Otherwise a plaintiff with a small claim could force a defendant with a large claim to litigate in state court if plaintiff were first to the courthouse. Unfortunately the weight of authority is contrary to the result I have just described, and would not allow removal in these circumstances.⁴⁹ The Institute would allow removal on these facts;⁵⁰ its provision to this effect would not only contribute clarity on a point about which the law is unclear but would also lead to a more rational allocation of cases between state and federal courts.

Federal Question Jurisdiction

We can now turn away from diversity for the time being and look at what the Institute has recommended in the important area of fed-

⁴⁴STUDY § 1301(e).

⁴⁵28 U.S.C. § 1441(b) (1964).

⁴⁶C. WRIGHT, *FEDERAL COURTS* 88 (1963).

⁴⁷STUDY § 1304(b).

⁴⁸National Upholstery Co. v. Corley, 144 F. Supp. 658 (M.D.N.C. 1956).

⁴⁹C. WRIGHT, *FEDERAL COURTS* 106 (1963).

⁵⁰STUDY § 1304(d).

eral question jurisdiction. Here the basic rationale is that

... federal question jurisdiction is necessary to preserve uniformity in federal law and to protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy.⁵¹

Diversity jurisdiction has always been a source of much controversy but, in recent years at least, no one has doubted that questions of federal law are appropriate business for federal courts. Presently there are many cases involving important issues of federal law that cannot be brought in a federal court. This will remain true in a few instances if the Institute's proposals should be adopted, but for the most part the proposals would make a federal forum open to the parties, if either of them should prefer to litigate there, whenever there is a significant issue of federal law in the case.

The appropriateness of a federal forum for federal issues should not depend on the amount in controversy. The present stated requirement that more than \$10,000 be in controversy for federal question cases is largely illusory, and, to the extent that it is an actual limitation, as in a suit against a federal officer, it is wholly anomalous. Thus, with one limited exception,⁵² we have proposed that federal jurisdiction exist without regard to amount in controversy.⁵³

Earlier I discussed the case of the railroad that seeks a declaratory judgment to find out whether it may honor its contract to issue a free pass each year despite an Act of Congress limiting the issuance of passes. The general statute on federal question jurisdiction, § 1311(a), as we have proposed it would provide for jurisdiction in such a case in so many words, and thus eliminate the tortuous consideration of ancient analogies that is now needed to determine whether jurisdiction exists.

Access to a federal court for the determination of federal questions should not depend on where in the country the parties live or can be served with process. Accordingly we propose to allow nationwide service of process and to provide a broad choice of venue, so that suit may be brought in a convenient court.⁵⁴

The most important change required, however, by this general rationale of the appropriate scope of federal question jurisdiction is

⁵¹*Id.* at 4.

⁵²*Id.*, § 1312(a)(2).

⁵³*Id.*, §§ 1311(a), 1312(a)(1), 1312(a)(3).

⁵⁴*Id.*, § 1314.

that the Institute has accepted the view of the Reporters that the door of the federal court should be open where federal law is relied on as a defense in a case. It should not be limited, as it has been since 1894, to those cases in which federal law is the basis of the plaintiff's claim.⁵⁵ The importance of uniformity in federal law, and the special competence of federal judges to interpret federal law, does not depend on whether that law is relied on in the complaint or in the answer. Thus we propose, in § 1312(a)(2), to allow either side to remove if there is a substantial defense asserted arising under the Constitution, laws, or treaties of the United States. This is the one place in the federal question section in which we have preserved the requirement that more than \$10,000 be in controversy. Removal on the basis of a federal defense is a device with which we have had no modern experience, and there are fears that it might be used as a tactic for harassing plaintiffs with small claims. Accordingly it was thought best to limit the device, initially at least, to those cases in which a significant sum is at stake. We have also specifically excluded from removal, by § 1312(b), nine particular classes of cases in which removal seems inappropriate.

Removal on the basis of a federal defense was the hardest fought issue within the Institute in the federal question area, if not indeed in the entire Study. There was agreement throughout that this kind of removal should be permissible in some cases, but there were serious differences about how broadly this should be allowed. Indeed at one point the Institute, by a vote of 102 to 92, directed that the Reporters bring back alternative drafts of the federal defense removal section, one allowing this kind of removal generally and the other narrowing removal on this ground.⁵⁶ We did so, and at the 1967 Annual Meeting, the Institute, after extensive debate, voted decisively in favor of the broader and more general draft.⁵⁷ My judgment on the point is clearly a biased one, but I believe that this provision is a major advance toward a more rational allocation of division of jurisdiction.

Two of the other proposals in the federal question area go to matters I cited at the outset as examples of defects in the present statutes. You will recall the case of the mine superintendent with two claims against a union, one based on the Taft-Hartley Act and one based on state law, who could have found out that he could bring the entire action in a federal court only by studying the Supreme Court

⁵⁵*Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894).

⁵⁶43 ALI PROCEEDINGS 309 (1966).

⁵⁷44 ALI PROCEEDINGS 83 (1967).

decisions and ignoring what seem the plain implications of the present statutes. We have attempted to provide guidance for a person in that position by defining with some care, in § 1313, the circumstances under which a claim created by state law may be heard because it is joined with a related federal claim. The statute should further the Bright Line Policy by making an obscure and confusing part of the law clearer than it has been.

We also addressed ourselves to the strange rule that a case exclusively within federal jurisdiction may not be removed from state to federal court. We specifically abolished the rule, so that such a case under our proposals would be removable.⁵⁸ But we went beyond that to cut down the occasions in which such a situation can arise by proposing repeal of most of the provisions for exclusive federal jurisdiction,⁵⁹ so that exclusive jurisdiction is confined to the situations in which there is a strong federal interest that seems to require a federal forum, and obscure, unneeded statutes making jurisdiction exclusive in various cases do not remain on the books as traps for the unwary.

In one respect we declined a tempting opportunity to clarify federal question jurisdiction. Though there are many cases in point, and some of the greatest names in the history of the Supreme Court have spoken to the question, there is still no clear test by which to tell when a case is one "arising under" the Constitution, laws, or treaties of the United States. We were strongly pressed to draft our general statute on federal question jurisdiction in analytical terms, and to provide a clear test for jurisdiction. We decided not to do this, and to retain, with some minor improvements, the cryptic language of the present statute. The fact is that while this issue raises fascinating intellectual problems, and provides marvelous examination questions for law professors to use, in practice it is of almost no significance. I doubt if I see as many as one reported decision a year in which there is any serious question whether the case is or is not within federal question jurisdiction. In the real world almost all cases fall within stereotyped patterns for which the answer is perfectly clear. No elaborate research is required to see that a suit to recover overtime wages under the Fair Labor Standards Act does arise under federal law, while my automobile accident suit against Dean Steinheimer does not. Most other cases are equally easy. Since the law, however

⁵⁸STUDY §§ 1312(d), 1317(b).

⁵⁹*Id.*, § 1311(b).

murky in theory, does work well in practice, we concluded that any attempt to clarify it by substituting new language might indeed lead to lack of clarity as courts were forced to struggle with a new text rather than applying the familiar rules developed under the old.

General Provisions

I will not discuss the sections of the Study dealing with admiralty and maritime jurisdiction⁶⁰ or with cases to which the United States is a party.⁶¹ Here we accepted the existing division of business between state and federal courts and attempted only to restate it in a clearer and more coherent fashion. There are however a number of general provisions, applicable to all heads of federal jurisdiction, that require at least brief mention.

First, the Supreme Court since 1940 has developed a variety of rules, generally known as the "abstention doctrines," that recognize various circumstances in which a federal court, though it has jurisdiction, ought to defer to the state courts and let the state courts answer some or all of the questions the case poses.⁶² The circumstances in which these doctrines are applicable are not clearly defined. In the last three years there are at least 94 reported opinions of the lower courts in which they have struggled to apply the doctrines and have reached wildly inconsistent results. When a court decides that one of the abstention doctrines requires it to abstain in a particular case, the result frequently is endless expense and delay, as a case starts out in the federal court, is then litigated through the whole system of state courts on some issues, and finally returns for further litigation in the federal system in the light of the answers the state courts have given on the state law matters. Our proposed § 1371, attempts to deal with this in statutory terms. It defines a rather narrow class of cases in which it is desirable that the federal court defer to the courts of the state, and provides procedures that ordinarily will mean that if the federal court does so defer, the federal court is then out of the case for good and the suit proceeds to judgment in the state courts. I hope this provides a more rational allocation than the present amorphous court-made doctrines. I am confident that it is clearer, less wasteful, and that it will reduce conflict between the two systems.

Next, we have dealt with injunctions from one court against proceedings in the other system of courts. We have sought to limit the

⁶⁰*Id.*, §§ 1316-1319.

⁶¹*Id.*, §§ 1321-1327.

⁶²C. WRIGHT, *FEDERAL COURTS* § 52 (1963).

situations, and define them more clearly, in which a federal court may enjoin state court proceedings,⁶³ while at the same time we have put in statutory form for the first time, and somewhat broadened, the rule on when a state court may enjoin federal court proceedings.⁶⁴

There are some circumstances, of which the most important are suits to enjoin enforcement of a state statute on the ground that it is unconstitutional, in which a special kind of federal court, made up of one judge of the court of appeals and two district judges, is required.⁶⁵ Any lawyer or judge who has ever had occasion to be concerned with one of these cases will agree with Judge Friendly's description of the statutes calling for this special three-judge court as "deceptively simple."⁶⁶ We concluded, with some hesitation, that the general idea of having a three-judge court should be preserved, although we have narrowed the kinds of cases in which it is required. Perhaps the most significant innovation here is that we propose that this special court be convened only on the request of the state official who is being sued. This should reduce the number of cases in which this procedure, which takes such a heavy toll of judicial time, is used, but it has an even more important consequence. Presently it seems to be the law that the requirement of three judges is a jurisdictional requirement.⁶⁷ Thus if it never occurs to any party or to the court that the three-judge statute applies, and a case is fully tried before a single judge, it is necessary to start all over again if an appellate court later should decide that the case is within the three-judge requirement. Our proposal would avoid "so bizarre a result"⁶⁸ as this and in other ways would make it easier than it now is to tell whether three judges are needed.

Another group of proposals deal with the procedure for removing a case from state court to federal court.⁶⁹ These resolve ambiguities in the present statutes on this subject, and also put an end to the outrageous practice by which a case in state court can be stopped in its tracks at the last minute by a frivolous petition for removal.⁷⁰ There is also an extensive series of sections dealing with what is

⁶³STUDY § 1372.

⁶⁴*Id.*, § 1373.

⁶⁵28 U.S.C. § 2281 (1964).

⁶⁶*Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 114 (2d Cir. 1966).

⁶⁷*Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 153 (1963); *Borden Co. v. Liddy*, 309 F.2d 871 (8th Cir. 1962); *Riss & Co. v. Hoch*, 99 F.2d 553 (10th Cir. 1938).

⁶⁸*Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106 (2d Cir. 1966).

⁶⁹STUDY §§ 1381-1384.

⁷⁰*Id.*, § 1383(a).

called "multi-party multi-state diversity jurisdiction."⁷¹ These would make it possible for a federal court to hear certain rare cases in which the parties who must be joined are scattered in different states and there is presently no court, state or federal, that can obtain jurisdiction over all of them.

Finally I would call your attention to § 1386, a provision that has long been needed in the federal courts. It ends the ancient rule that an objection to federal jurisdiction can be raised at any time. It is designed to prevent waste of judicial resources by smoking out any objections to jurisdiction early in the litigation, and by preventing, under normal circumstances, any consideration of defects in jurisdiction after the federal court has begun trial on the merits.

REACTION TO THE PROPOSALS

This package of proposals for restructuring the relation between state and federal courts is extensive and complicated. Inevitably it has already aroused opposition and no doubt more is to come. It would be astonishing if any lawyer were to review all of the Institute's work without finding details here and there with which he disagrees. If I were free to rewrite the draft to express my own preferences on how each of the subjects it deals with should be handled it would differ in many respects from the document as it now appears.

The diversity proposals, for example, were completed before I became associated with the project and my reservations about them have long been a matter of public record.⁷² I accept generally the rationale that underlies the diversity proposals, but I think that the rationale has been stretched too far in barring a commuter from invoking federal jurisdiction in the state in which he works. I fear also that the provisions about businesses with a "local establishment," though rationally defensible, are so complex that in this instance rationality should have been sacrificed in favor of clarity and efficiency of judicial administration.

Even in the portions of the Study for which I was Reporter, there are things I would have preferred to see handled differently. Some are matters of small detail while others are of greater importance. I am totally opposed, for example, to the provision allowing a federal court to certify to a state court questions of state law in those states

⁷¹*Id.*, §§ 2371-2376.

⁷²₄₁ ALI PROCEEDINGS 69, 72 (1964). See also C. WRIGHT, FEDERAL COURTS § 23 (1963).

that allow their courts to give advisory opinions of this kind.⁷³ I agree with Judge Hale, of the Washington Supreme Court, that "the certification procedure is a dilatory one and in the long run compounds the very delays it is claimed to help curtail and magnifies the uncertainties it is claimed to eliminate."⁷⁴ But the members of the Institute listened very attentively while Professor Field and I stated our objections to the certification provision and they then voted overwhelmingly in favor of the provision.⁷⁵ I remain stubbornly unconvinced on the subject, but when such distinguished persons as Dean Griswold of the Harvard Law School and Judge Gignoux of the District Court in Maine argued strongly for the position the Institute ultimately took, it demonstrates that many of these issues are difficult ones, on which men of reason and good will do not always come to the same conclusion.

I have mentioned my own doubts only to emphasize the point that the document that will be given to the Chief Justice in a few days does not contain my recommendations, nor those of Professor Field or Professor Mishkin. They are rather the recommendations of the American Law Institute, and represent the collective judgment after years of work and study of a large group of learned people who have undertaken a disinterested appraisal of how these hard questions of jurisdiction can be solved in a fashion that will best serve our country.

Naturally the recommendations of the Institute have not gone unchallenged. It is surely an exaggeration to say, as a publication of the American Trial Lawyers Association has done, that the Institute's proposals have "brought a storm of protest against change from bar associations, trial lawyers and state judges."⁷⁶ Debate and criticism there have been. This was certainly to be expected, and, so long as it is reasoned debate and responsible criticism, it is all to the good. I welcome, for example, the two lengthy articles in which Professor David Currie, of the University of Chicago Law School, has analyzed with skill and care every aspect of the proposals, agreeing with some and disagreeing with others.⁷⁷ Nor am I surprised that distinguished members of the profession should publicly express very different attitudes about the general approach taken in the diversity sections. Some persons whose voices must be listened to with the utmost respect

⁷³STUDY § 1371(e).

⁷⁴In *re Elliott*, 446 P.2d 347, 371 (Wash. 1968) (dissenting opinion).

⁷⁵43 ALI PROCEEDINGS 371-388 (1966).

⁷⁶*Supra* note 31.

⁷⁷Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 268 (1968-1969).

believe that that head of jurisdiction should remain substantially unchanged and perhaps even be expanded.⁷⁸ Others, such as Professor Currie, conclude that "the security given out-of-state interests by this jurisdiction is not worth the burden of defining and administering it,"⁷⁹ and would eliminate this head of jurisdiction entirely. Finally there are those who think the balance struck by the Institute with regard to diversity is the right one⁸⁰ and that it "makes a good deal of sense."⁸¹

I confess to disappointment at those segments of the organized bar that have hurried to announce their opposition to any change that would significantly limit the present jurisdiction of the federal courts—though they are apparently not adverse to expansion of that jurisdiction. The Committee on Jurisprudence and Law Reform of the American Bar Association, for example, on the basis of a very brief report, has recommended that the ABA oppose the Institute's diversity proposals.⁸² Action on this was postponed by the House of Delegates on the ground that it would be premature to act until the Institute had completed its entire Study.⁸³ The National Board of the American Trial Lawyers Association, apparently speaking of the diversity provisions only, though this is not entirely clear, has called the proposals "dangerous, unwise, arbitrary and an obstruction to full and fair administration of justice."⁸⁴ The attitude of these critics is best summed up by the bar association in one of the western states that resolved that it was against any of the Institute's proposals that would restrict federal jurisdiction and for those proposals that would broaden federal jurisdiction.

It would be pleasant to think that this enthusiasm for federal jurisdiction is a tribute to the high quality of the federal courts. If that were so, it would be time to institute a crash program for the improvement of the state judicial systems. The proposition would have been

⁷⁸Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1 (1964); *supra* note 72. Judge J. Skelly Wright has expressed a generally similar view in his article, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967).

⁷⁹Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 49 (1968-1969).

⁸⁰C. MCGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES 85-87 (1969); Marden, *Reshaping Diversity Jurisdiction: A Plea for Study by the Bar*, 54 A.B.A.J. 453 (1968).

⁸¹Asher v. Pacific Power and Light Co., 249 F. Supp. 671, 678 (N.D. 1965).

⁸²92 ABA REP. 450 (1967).

⁸³*Id.* at 329-330.

⁸⁴*Supra* note 31.

tested if the Institute had proposed extending federal jurisdiction as far as the Constitution permits, but making that jurisdiction exclusive so that the option of a state forum would no longer have been available. My guess is that the critics I have just described would have been even more outraged by such a proposal, for I believe the basis for their position is not that they love the state courts less but that they love a choice of forum more. Of course it is tactically advantageous to be able to choose, and to pick for each case the system of courts in which a favorable result seems more likely. But surely our dual court structure was created to serve some loftier purpose than tactical maneuvering. It is dismaying to see respected bar groups asserting a vested interest in preserving jurisdictional statutes that have developed quite fortuitously and that are demonstrably irrational, unclear, inefficient, and productive of unnecessary friction.

CONCLUSION

So far I have discussed these matters as one who had a part in working with them and who has therefore a natural bias in their favor. It is hard to view objectively a report that one has helped to draft. But I was a Reporter for the American Law Institute for only a little more than five years, while all of my adult life has been spent in working, both as a writer and as a reformer, for the improvement of the administration of justice in American courts. It is in that capacity, and with as much objectivity as I can muster under the circumstances, that I would like to appraise the Institute's proposals as a whole.

In my judgment adoption of the recommendations of the American Law Institute would be a major step in the right direction for the better administration of justice and for the wise ordering of our federal system. The proposals there presented would make the division of jurisdiction between the two systems more rational than it has been in the past. That is a significant accomplishment, but it is the least important accomplishment of the proposals. If we must choose between a reasoned division of jurisdiction and a workable division of jurisdiction, I would choose the latter every time. The Institute's proposals, I suggest, do make the system more workable. They minimize conflicts between the two judicial systems. They promote efficiency by cutting down on duplicative and unnecessary litigation. And, most important of all in my judgment, they make the jurisdictional line far clearer than it has ever been in the past. They provide answers

in the statute book itself that any lawyer or judge can read and understand to questions that heretofore have either required elaborate study in the cases and the textbooks to answer or that have indeed been unanswerable.

It is easy to find fault with this or that proposal. Any of us can do that. But if each person interested in the well-being of our courts insists on his own pet provisions, we shall be so busy arguing among ourselves that any prospect for meaningful reform will be irretrievably lost. I hope that all of those who care about our courts will give careful study to the full text of the Institute's recommendations. If these persons conclude, as I have done, that the things with which they agree far outweigh those aspects of the proposals with which they disagree, if they conclude that on balance the adoption of the recommendations would improve the administration of justice in the United States, then I hope that they will support enactment of the proposals as a whole. There will be time enough later to refine and improve particular details. My most earnest hope—and my strong conviction—is that as lawyers examine the proposals of the American Law Institute, they will ask not what effect those proposals would have on their fees, or on the class of clients they habitually represent, but whether the proposals are in the best interest of the courts of our great country.

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DIVERSITY JURISDICTION UNDER THE AMERICAN LAW INSTITUTE PROPOSALS: ITS PURPOSE AND ITS EFFECT ON STATE AND FEDERAL COURTS

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This article has a twofold purpose: to outline the proposed changes in diversity jurisdiction recommended by the American Law Institute as well as the rationale advanced for these changes; and to evaluate the effect of the proposed changes on the state and federal courts.

THE ORIGIN OF THE ALI STUDY

On May 11, 1971, as Chairman of the Subcommittee on Improvements in Judicial Machinery, I introduced S. 1876, a bill entitled the Federal Court Jurisdiction Act of 1971. This bill is the result of a study made at the suggestion of then Chief Justice Earl Warren.

In proposing this study, Chief Justice Warren stated:

It is essential that we achieve a proper jurisdictional balance between the Federal and State court systems, assigning to each system those cases most appropriate in light of the basic principles of federalism.¹

Establishing a principled division of jurisdiction between state and federal courts was a problem with which the American Law Institute² struggled for 10 years. The result of their study is this

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The author also wishes to thank John Olson, a third-year law student at the University of North Dakota and a summer intern, who conducted valuable research on special problems regarding the jurisdiction of the federal courts.

1. Speech to the American Law Institute, May 20, 1959.

2. The American Law Institute is a body of distinguished judges, members (lawyers and legal scholars) of the bar, and law professors. They are responsible for the well known Restatement of the Law, as well as such legislation as the MODEL PENAL CODE and the UNIFORM COMMERCIAL CODE.

bill, a substantial revision of the chapters of title 28 of the United States Code, which delineate the jurisdiction of the federal district courts, the procedures for its invocation, and the limitations on its exercise. The draft legislation and commentary explaining the reasons for the changes were published in 1969.³

While we may not all agree on the fine points of this bill, those who study it will share my appreciation of the scholarship, craftsmanship, and objectivity of the Institute's work. As in all Institute projects, their draft proposals were systematically reviewed by the advisers and by the council at annual Institute meetings, a process that made an enormous contribution to the shaping of the final product.⁴

Before proceeding to the specific proposals of this bill it may be helpful to briefly outline the development of the federal court system.

ORGANIZATION OF THE FEDERAL COURTS

The Judiciary Act of 1789⁵ laid out the basic framework of our judicial system. The jurisdiction presently vested in the federal courts is the result of statutes enacted at various times in our history with various specific purposes in mind.

The act of July 27, 1866⁶ broadened removal in diversity cases—about one-sixth of all diversity cases now come to the federal bench by removal. The act of March 3, 1875⁷ gave the lower federal courts, for the first time, jurisdiction in cases arising under the Constitution, laws, or treaties of the United States—the “federal question” jurisdiction, which accounted for 45 per cent of all civil cases filed in federal courts last year.

These jurisdictional grants increased the jurisdiction of the federal courts. To accommodate the increased work, the circuit courts of appeals were created in 1891,⁸ and the “judges’ bill” in 1925⁹ made most review in the Supreme Court discretionary rather than a matter of right.

In light of increasing caseloads of *both* federal and state courts it is appropriate to examine the division of jurisdiction between the state and federal courts.¹⁰

3. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). Hereafter referred to as ALI STUDY.

4. Study of the Division of Jurisdiction between State and Federal Courts, Tentative Draft No. 1 (1963); Tentative Draft No. 2 (1964); Tentative Draft No. 3 (1965); Tentative Draft No. 4 (1966); Tentative Draft No. 5 (1967), and Tentative Draft No. 6 (1968). There was also an Official Draft Part I (1965).

The discussion of the proposals is reported in 40-45 ALJ PROCEEDINGS (1963-1968).

5. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

6. 28 U.S.C. § 1441 (1971).

7. 28 U.S.C. § 1331 (1971).

8. 26 Stat. 826, ch. 517, 28 U.S.C. § 43 (1971).

9. 28 U.S.C. § 1254 (1971).

10. In 1970, a total of 127,280 civil and criminal actions were commenced in the U.S.

DIVERSITY JURISDICTION

THE ALI PROPOSALS IN GENERAL

The conclusions of the ALI study, introduced as S. 1876, were presented in the form of a proposed revision of those sections of title 28 of the United States Code that now delineate the jurisdiction of the district courts in six major areas: 1) diversity jurisdiction;¹¹ 2) federal question jurisdiction;¹² 3) United States as a party;¹³ 4) jurisdiction of three-judge courts;¹⁴ 5) admiralty and maritime jurisdiction;¹⁵ and 6) multiparty-multistate diversity.¹⁶

It would be beneficial before proceeding to a discussion of diversity jurisdiction to briefly summarize the changes in the present law which would be made by the ALI recommendation in the other major areas.

Outline of the ALI Proposals

I. Federal Question Jurisdiction. The bill would abolish the \$10,000 jurisdictional amount presently required and original actions could be brought based upon the existence of a federally created right, regardless of the amount in controversy.¹⁷ The same rationale would permit removal of a case from state to federal court, in certain cases, if a counterclaim based on a federal right is interposed.¹⁸ But where the federal right is asserted as a defense, removal could not be had unless the amount in controversy met the \$10,000 requirement.¹⁹

II. United States as a Party. The bill makes certain technical changes in this category of jurisdiction by clarifying the existing law relating to counterclaims and set-offs which can be asserted in an action brought by the United States.²⁰ It would increase from \$10,000 to \$50,000 the jurisdiction of the district courts in Tucker Act suits based on contract claims against the United States.²¹ Jurisdiction is further clarified as to any action brought against an officer or employee of the United States arising out of performance of his official duties.²²

district courts, 13 percent more than fiscal year 1969. The 1970 increase in case filings was the steepest caseload jump for any year in the last decade. The caseload has grown immensely in the last decade. On June 30, 1970, there were 114,117 civil and criminal cases pending, 10 percent more than a year ago, and 66 percent greater than the 68,942 pending on June 30, 1960. The rise in state civil caseloads can be seen in Table 6.

11. S. 1876, 92d Cong., 1st Sess. §§ 1301-1307 (1971); cf. generally 28 U.S.C. §§ 1332, 1359, 1391, 1404, 1441 (1971).

12. *Id.* at §§ 1311-1315; cf. generally 28 U.S.C. §§ 1331, 1391, 1441 (1971).

13. *Id.* at §§ 1321-1327; cf. generally 28 U.S.C. §§ 1345, 1346, 1349, 1357, 1361, 1406, 1442 (1971).

14. *Id.* at §§ 1371-1376; cf. generally 28 U.S.C. §§ 2281, 2282, 2283, 2284 (1971).

15. *Id.* at §§ 1316-1319; cf. 28 U.S.C. § 1333 (1971).

16. *Id.* at §§ 2371-76; cf. 28 U.S.C. §§ 1332, 1441 (1971).

17. *Id.* at § 1331(a).

18. *Id.* at § 1312(a).

19. *Id.*

20. *Id.* at § 1321(b).

21. *Id.* at § 1322(a).

22. *Id.* at § 1323.

III. *Three-Judge Courts.* The bill would limit the occasions when a three-judge court would be required. None would be required if the issue is the constitutionality of an act of Congress.²³ Three judges would hear a case involving validity of a state statute, but only if requested by the state official being sued.²⁴ The circumstances when a federal court should abstain from passing upon the constitutionality of state legislation or actions is clarified.²⁵

IV. *Admiralty and Maritime Jurisdiction of the Federal Courts.* Jurisdiction in this area is not significantly changed. Rather, the bill seeks to clarify existing statutory law and codify existing case law in admiralty cases. The bill does, however, clarify the right to a jury trial in admiralty cases [brought for] personal injuries or death.²⁶

V. *Multiparty-Multistate Litigation.* It is proposed to extend the jurisdiction of federal courts to cover those few situations where necessary parties are not subject to the jurisdiction of any one court, but are scattered in several states, and there exists diversity of citizenship among adverse parties.²⁷

There is one other area covered by the ALI proposals which remains the most controversial area of federal jurisdiction—diversity jurisdiction.

The Rationale for Diversity Jurisdiction

The American Law Institute, after considerable study and deliberation, developed its jurisdictional proposals on the premise that, generally, it is preferable to have matters of state law decided by state courts and, correspondingly, matters of federal law by federal courts. With respect to diversity jurisdiction, the Institute reached the judgment that such jurisdiction should extend only to the purposes intended by the framers of the Constitution and the Congress that passed the Judiciary Act of 1789. That purpose was to provide travelers and strangers access to a federal court and to insure an even level of justice when outsiders were suing or being sued outside their home state. As stated by Charles Warren in his illuminating study of the passage of the Judiciary Act of 1789:

The chief and only reason for this diverse citizenship jurisdiction was to afford a tribunal in which a foreigner or citizen of another State might have the law administered free from the local prejudices or passions which might prevail in

23. *Id.* at § 1374; cf. 28 U.S.C. § 2282 (1971). It believed that the federal government, unlike a state, should not be *unduly embarrassed* by the ruling of a single federal judge. When the federal government is the party, there is no separate sovereign.

24. *Id.* at § 1374.

25. *Id.* at § 1371(c).

26. *Id.* at § 1319.

27. *Id.* at §§ 2371-2376.

a State Court against foreigners or non-citizens. The Federal Court was to secure a non-citizen the application of the same law which a State Court would give to its own citizens, and to see that within a state there should be no discrimination against non-citizens in the application of justice.²⁸

Thus, the classic reason for the constitutional grant of diversity jurisdiction was the protection of non-residents against local prejudice or the apprehension of such prejudice in the state courts.

THE ALI DIVERSITY PROPOSALS

If the rationale for diversity jurisdiction is to assure an even level of justice to the traveler or visitor from another state, what amendments are suggested to the present scheme of diversity jurisdiction? The Institute has concluded that when a person's involvement with a state is such as to eliminate any real risk of prejudice against him as a stranger and to make it unreasonable to heed any objection he might make to the quality of its judicial system he should remain in a state court and not have the option of a federal forum.

The very heart of the present bill is the provision of section 1302 which would prevent a person from invoking diversity jurisdiction in a federal court in his home state simply because his opponent happens to be an out-of-stater.²⁹ It is the most far-reaching in terms of the number of cases involved.³⁰

On a similar basis, a corporation or other business enterprise with a "local establishment" maintained for more than two years in a state would be prohibited from invoking, either originally or on removal, the diversity jurisdiction of a federal court in that state in any action arising out of the activities of that establishment.³¹ Similarly, a "commuter" provision would bar a natural person from access to the federal court in the state where he had his principle place of business or employment.³²

These provisions are in line with the policy of the present statute, regarding removal, which does not allow removal when the defendant is a citizen of the state in which such action is brought.³³ As stated by one commentator:

This inconsistency between the treatment of an in-state plaintiff and an in-state defendant cannot be explained on any rational basis, even if we go back to the early days of

28. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923).

29. S. 1876, 92 Cong., 1st Sess. § 1302(a) (1971).

30. See Tables 1 and 2 *infra*.

31. S. 1876, 92d Cong., 1st Sess. § 1302(b).

32. *Id.* at § 1302(c).

the Republic. No one has yet devised any satisfactory rationale as to why the Federal courts, conceived of as courts of limited jurisdiction under the Constitution, should provide a forum for local residents who, for some reason or another, do not wish to sue in the courts of their own state.³⁴

What this bill does is to treat resident plaintiffs the same way resident defendants have always been treated—by denying them original diversity jurisdiction in the federal court in their own state.

The policy goal with regard to commuters and corporations is equal treatment with natural persons: when they are strongly established in the state, their case as plaintiff or defendant can be heard in state court without fear of local bias.

Other provisions are designed to reinforce the prohibition against the artificial creation or destruction of diversity either by assignment or the appointment of a fiduciary.³⁵

Provisions Expanding Diversity Jurisdiction

Much attention in regard to the Institute's proposals have centered on those provisions reducing diversity jurisdiction. However, it should not be overlooked that a number of important changes recognize the functional necessity in a particular case for granting to a party the option of a federal hearing on his claim.

An important change in light of the number of cases involved would allow an out-of-state defendant to remove an action to the federal court even though complete diversity is lacking because his co-defendants are ineligible or unwilling to remove.³⁶ This is a commendable provision since a non-resident should not be barred from the federal courts, which often happens under present law,³⁷ simply because he is joined with a local defendant or any other defendant who is unable or unwilling to remove. As an outsider there may be potential bias towards him as against local defendants especially with regard to the determination of joint and several liability.

Diversity jurisdiction is also extended by section 1301(e) which would cover a situation where one member of a family commences a diversity action and other members of the family have claims against the same defendant and arising out of the same transaction or occurrence. These related claims can be joined in the same action even though they are not sufficient to meet the requirement as to amount in controversy.

A third expansion takes place under sections 2371-2376 which would give the district courts nationwide jurisdiction over all dis-

33. 28 U.S.C. § 1441 (1971).

34. Testimony of Attorney Orison S. Marden in hearings on S. 1876 before the Senate Subcommittee on Improvements in Judicial Machinery, September 28, 1971.

35. S. 1876, 92d Cong., 1st Sess. § 1307 and § 1301(b)(4).

persed parties whose presence is necessary for a just adjudication of the plaintiff's claim, but who are not all amenable to the process of any one court, federal or state. This so-called "multiparty-multi-state" diversity jurisdiction is a change required by our mobile society and complex economy.

While the number of cases affected would be slight, further expansion results from provisions relating to citizenship of unincorporated associations³⁸ to removal based on a counterclaim asserted in a state court action³⁹ and a prohibition against use of an assignment to defeat diversity jurisdiction.⁴⁰

EFFECT ON THE COURTS

Critics of the ALI proposal have suggested that its effect will be to shift cases to congested state courts. This was a matter touched on by Chief Justice Warren in his address, to the American Law Institute, commencing this study. He cautioned that revision of jurisdiction should not be made without due regard for its effect upon state courts.⁴¹ As chairman of the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee I share this concern. Unless improvements are made in the administration of justice in *both* the federal and state court systems, neither one alone is likely to make any improvement in the problem we face in achieving just, efficient and timely resolution of controversies brought before our courts. The remaining portion of this article will be directed to a study of the impact of S. 1876 upon our courts.

The Effect On Federal Courts

As I have stated, of particular concern to me is the effect of this legislation upon the court systems of our respective states. However, it is first necessary to examine the effect of the diversity provision of S. 1876 upon the federal district courts. For purposes of illustration, Tables have been included within the text.

In making its proposal, the American Law Institute studied the effect upon the federal court system for the years 1964 and 1968. It reported that for fiscal year 1964 out of 20,174 total civil diversity cases, 11,543 would have been shifted from federal courts to state

36. *Id.* at § 1304(b).

37. 28 U.S.C. § 1441. This section requires complete diversity of all parties and is apparently based on the belief that such a rule is required [*Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)]. The Institute concluded that complete diversity was not constitutionally required and this judgment was accepted by the Supreme Court [*State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-531 (1967)].

38. S. 1876, 92d Cong., 1st Sess. § 1301(b)(2).

39. *Id.* at § 1304(c).

40. *Id.* at § 1307.

41. Speech of Chief Justice Earl Warren to the American Law Institute, May 20, 1959.

TABLE 1
RESIDENCES OF PARTIES IN DIVERSITY OF CITIZENSHIP CASES COMMENCED
IN THE UNITED STATES DISTRICT COURTS, FISCAL YEAR 1970

Class	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	5,901a	1,775a	7,676
2. Resident		Non res. corp. not doing business in state	1,046a	283	1,329
3. Resident		Other non resident	2,832a	831	3,663
4. Non res. corp. doing business in state		Resident	1,867a	78b	1,945
5. Non res. corp. not doing business in state		Resident	724	18b	742
6. Other non resident		Resident	5,026	95b	5,121
7. Non res. corp. doing business in state		Non res. corp. doing business in state	265a	54a	319
8. Non res. corp. doing business in state		Non res. corp. not doing business in state	71a	14	85
9. Non res. corp. doing business in state		Other non resident	99a	12	111
10. Non res. corp. not doing business in state		Non res. corp. doing business in state	88	10a	98
11. Other non resident		Non res. corp. doing business in state	883	70a	953
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state	31	2	33

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13. Non res. corp. not doing business in state	Other non resident	31	4	35
14. Other non resident	Non res. corp. not doing business in state	96	14	110
15. Other non resident	Other non resident	427	56	483
16. Resident	Resident	119a	24	143
17. Unknown		4	4	8
Total Cases		19,510	3,344	22,854

a Shifted by S.1876 to state courts. These cases total 14,109. See Table 2 for further analysis.

b These cases are not counted as shifted because it is assumed there is a non resident defendant properly joined.

Source: Administrative Office of the United States Courts.

courts under these proposals. For fiscal year 1968, 12,367 out of 21,009 diversity cases would have been so affected.⁴²

In fiscal year 1970, the United States district courts had a total of 127,280 new case filings, both civil and criminal. Civil cases amounted to 81,107 cases. Included in this total of civil cases were 22,854 cases in which the basis of federal jurisdiction was diversity of citizenship.

Table 1 furnishes a breakdown of these diversity cases by residence of the party plaintiff and of the party defendant. In preparing Table 1 certain basic assumptions were made: 1) In all cases involving non-resident corporations doing business in a state, "doing business" is the equivalent of having "a local establishment" and that these cases have arisen from the local activities of that organization⁴³ and 2) No account is taken of the commuter provision. The effect of the commuter provision will vary depending on the location of urban centers within the state. Accurate data can be obtained only if docket studies are conducted. Such a study was conducted in the Eastern District of Pennsylvania which encompasses Philadelphia, an area of high commuter activity, and it showed that 7.6 per cent of all original diversity cases in that district court would have been eliminated by the commuter proposal.⁴⁴ A state which has a comparable interstate commuter area would have a small, additional number of cases transferred to its courts.

The 1970 data in Table 1 shows a total of 19,510 diversity actions originally commenced in federal court and 3,344 removed from a state court. The classes marked by the letter (a) in Table 1 represent cases brought originally by resident plaintiffs and those brought or removed by a non-resident corporation doing business in a state which would be shifted to state courts under S. 1876. They total 14,109 cases, original and removed. These cases are assembled for further analysis in Table 2.

TABLE 2
DIVERSITY CASES EXCLUDED FROM FEDERAL
JURISDICTION UNDER THE ALI PROPOSAL (1970)

Class of Parties Affected By The ALI Proposal/a	Cases Shifted But Removable/b	Cases Excluded	Total
Resident Plaintiff Versus:			

42. ALI STUDY, 466-468. Of these totals, 2,723 cases in 1964 and 3,365 cases in 1968, although excluded from Federal Court as original actions, nevertheless would have been removable to Federal Court by a non-resident defendant.

43. Factually, these two concepts may not be equivalents. See ALI STUDY 466. Therefore, the actual number of "local establishment" cases transferred to the State Courts under this provision will be somewhat less than indicated in the classes of cases involving corporate parties "doing business" as shown in Table 1.

44. See ALI STUDY 469-79.

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(1)/c	Non res. corp. doing business in state		7,676	
(2)	Non res. corp. not doing business in state	1,046		
(3)	Other non resident	2,832		
(16)	Resident		119	
	Total	3,878	7,795	11,673

Non Resident Corporate Plaintiff Doing

	Business in State Versus:			
(4)	Resident		1,867	
(7)	Non res. corp. doing business in state		319	
(8)	Non res. corp. not doing business in state	71		
(9)	Other non resident	99		
	Total	170	2,186	2,356

Cases Removed by Non Resident Corporate Defendants Doing Business in State Sued By

(10)	Non res. corp. not doing business in state		10	
(11)	Other non resident		70	
			80	
	Total			80
TOTAL ALL CASES		4,048	10,061	14,109

a/ This table, as all others in this paper, does not include the effect of the commuter provisions, S. 1876, 92d Cong. 1st Sess. § 1302(c) (1971)—which would increase the cases shifted. It also assumes that all cases involving a corporation doing business arise out of the activities of a local establishment which, by approximation, exceeds the actual number of cases affected.

b/ Removed cases in classes (4), (5), (6), and (16)—involving removal by resident defendants—are treated as not affected by the proposal. It can be assumed that removal was requested by a properly joined non-resident defendant 28 U.S.C. § 1441 (c) (1971). See *Twentieth Century Fox Film Corp. v. Taylor*, 239 F. Supp. 913 (S.D.N.Y. 1965). S. 1876, 92d Cong., 1st Sess. § 1304(6) (1971) would both expand and clarify removal in this situation.

c/ The numbers in parentheses refer to the party alignments shown in Table 1.

Table 2 shows that a *maximum* of 14,109 diversity cases would be shifted from the federal courts to the state courts by the diversity jurisdiction provisions of the ALI proposal. Of this total 11,673 are cases commenced by residents⁴⁵ and 2,356 are cases commenced by non-resident corporations doing business in a state.

While 14,109 is the maximum number of cases affected by S. 1876,

45. "Residents" include both individuals and domestic corporations because the statistical reports of the U.S. Courts do not differentiate between these types of residents.

the actual number of cases which will be transferred to state courts will be less. One should note from Table 2 that of the total cases, only 10,061 are excluded from the jurisdiction of federal courts by the bill. The other 4,048 cases are those brought by a resident (individual or corporate) against a non-resident (individual or corporation not having a "local establishment"). These cases will have to be commenced in the state courts but they will be removable to federal court under section 1304 of the ALI proposal, just as they are removable under existing law. It seems likely that a large number of these 4,048 non-resident defendants will remove cases to the federal courts. Thus, the actual number of cases shifted to state courts will be somewhere between 10,000 and 14,000.

TABLE 3
ANALYSIS OF FEDERAL COURT CIVIL CASELOAD (1970)
AND INCIDENCE BY STATES OF ALI PROPOSED
CHANGES IN DIVERSITY JURISDICTIONS

States	Total Civil Cases Commenced	Total Diversity Cases	Total Diversity Cases Shifted By S. 1876
1st CIRCUIT			
Maine	198	60	34
Massachusetts	1,617	350	264
N. Hampshire	148	93	40
Rhode Island	219	78	26
Puerto Rico	978	385	295
2nd CIRCUIT			
Connecticut	720	193	83
New York	8,599	1,947	1,132
Vermont	333	261	107
3rd CIRCUIT			
Delaware	192	66	19
New Jersey	1,687	555	255
Pennsylvania	5,891	2,078	1,368
4th CIRCUIT			
Maryland	1,505	334	193
N. Carolina	1,188	337	193
S. Carolina	1,111	518	360
Virginia	2,639	718	442
W. Virginia	849	319	178
5th CIRCUIT			
Alabama	1,817	774	529
Florida	3,880	621	328
Georgia	2,035	649	350
Louisiana	4,988	925	645
Mississippi	949	462	274
Texas	5,524	1,506	1,105
6th CIRCUIT			
Kentucky	1,208	321	185

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Michigan	2,537	756	496
Ohio	2,519	783	517
Tennessee	1,816	662	390
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7th CIRCUIT			
Illinois	3,559	1,148	679
Indiana	1,618	940	523
Wisconsin	996	227	144
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8th CIRCUIT			
Arkansas	841	427	354
Iowa	479	202	132
Minnesota	921	363	190
Missouri	1,990	522	316
Nebraska	426	147	75
N. Dakota	129	47	29
S. Dakota	177	87	29
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9th CIRCUIT			
Alaska	247	60	45
Arizona	872	214	134
California	6,740	476	304
Hawaii	192	75	26
Idaho	225	70	36
Montana	275	102	52
Nevada	279	92	37
Oregon	799	285	202
Washington	1,090	194	170
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10th CIRCUIT			
Colorado	865	272	118
Kansas	954	299	164
New Mexico	484	184	110
Oklahoma	1,293	499	337
Utah	394	124	68
Wyoming	115	47	26
<hr/>			
TOTAL	81,107	22,854	14,109

Table 3 tabulates and summarizes the overall civil workload of the federal district courts, including the total civil cases commenced (column 1), and the total diversity cases (column 2). It also shows on a state-by-state basis the total number of diversity cases shifted each state under these proposals (column 3).

It should be noted that the total civil cases commenced in the federal district courts number 81,107 cases⁴⁶ and that the total diversity cases number 22,854. The 14,109 diversity cases shifted under this proposal would still leave the federal courts with 67,000 civil cases without including any increase in jurisdiction which would occur under the federal question, multiparty-multistate, family tort, and removal provisions of the ALI proposal.

Since the figures in column 3 of Table 3, standing alone, are

46. This total omits figures for District of Columbia, Guam, Virgin Island and Canal Zone.

relatively insignificant, it is necessary to compare them to the workload now being borne by each state court system.

Effect On State Courts

The Subcommittee on Improvements in Judicial Machinery requested state authorities to furnish information regarding the civil caseloads in their courts of general jurisdiction for the year 1970. At the time this article went to press, 33 states had responded, 30 of which furnished the appropriate information. A comparison of the diversity cases shifted under the ALI proposal to the total number of civil cases commenced in each of these 30 states is shown in Table 4. As might be expected the number of diversity cases which would be shifted, in all states except one, varied between 0.27 to 1.5 per cent of the total civil filings.⁴⁷

TABLE 4
DIVERSITY CASES SHIFTED COMPARED TO
TOTAL NUMBER OF STATE CIVIL CASES

States	Total No. of State Civil Cases	No. of Diversity Cases Shifted	Shifted Diversity Cases Compared To Total No. of State Civil Cases (%)
1st CIRCUIT			
Maine	—	34	—
Massachusetts	41,047	264	0.6
New Hampshire	12,741	40	0.3
Rhode Island	5,130	26	0.5
Puerto Rico	27,284	295	1.1
2nd CIRCUIT			
Connecticut	19,399	83	0.4
New York	75,809	1,132	1.5
Vermont	5,607	107 (all courts)	1.9
3rd CIRCUIT			
Delaware	4,203	19	0.5
New Jersey	35,777	255	0.71
Pennsylvania	25,707	1368 (780)*	3.0*
4th CIRCUIT			
Maryland	53,667	193	0.27

47. Pennsylvania reported only 25,707 civil cases as compared to a substantially larger volume for such States as Ohio and Michigan, for example. Apparently the Pennsylvania statistical system reports cases when they are filed at the time of commencement of the action. In order to offer some basis of comparison between Pennsylvania and Federal statistics, it must be noted that the Administrative Office of the U.S. Courts reports that in the nation as a whole 43% of all diversity cases are terminated without court action. If this same percentage is applied to the 1,368 cases shown in Table 3 as being shifted to Pennsylvania, 588 of those cases would be terminated without court action. Thus, the remaining 780 cases would be an approximation of the number of Federal cases shifted which would reach the "ready for trial" stage which is the Pennsylvania criteria for inclusion in its statistical system.

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N. Carolina	13,589	193	1.4
S. Carolina	**	360	**
Virginia	49,276	442	0.9
W. Virginia	**	178	**
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5th CIRCUIT			
Alabama	—	539	—
Florida	94,411	328	0.3
Georgia	—	350	—
Louisiana	108,749	645	0.6
Mississippi	—	274	—
Texas	200,992	1,105	0.6
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6th CIRCUIT			
Kentucky	—	185	—
Michigan	86,893	496	0.8
Ohio	50,060	517	1.0
Tennessee	63,505	390	0.6
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7th CIRCUIT			
Illinois	75,000(est.)	679	0.9
Indiana	**	523	**
Wisconsin	29,583 (1971)	144	0.5
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8th CIRCUIT			
Arkansas	29,531	354	1.2
Iowa	37,965	132	0.35
Minnesota	16,924	190	1.1
Missouri	71,166	316	0.45
Nebraska	—	75	—
N. Dakota	4,973	29	0.65
S. Dakota	5,938	29	0.5
<hr/>			
9th CIRCUIT			
Alaska	—	45	—
Arizona	—	134	—
California	103,749	304	0.3
Hawaii	4,335	26	0.6
Idaho	11,091	36	0.3
Montana	**	52	**
Nevada	—	37	—
Oregon	29,853	202	0.7
Washington	35,212	170	0.5
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10th CIRCUIT			
Colorado	17,717	118	0.6
Kansas	29,826	164	0.5
New Mexico	21,501	110	0.5
Oklahoma	—	337	—
Utah	—	68	—
Wyoming	**	26	**

Looking at one of the states by way of example, in Massachusetts, 264 cases would be transferred to the state courts compared to 41,047 cases filed in the courts of general jurisdiction of Massa-

* *Supra* note 47 and related text.

** These states do not report cases filed.

chusetts in 1970. Thus the cases transferred constitute only 0.6 per cent of the present state civil caseload in Massachusetts.

To further evaluate these proposals a determination was made of the average number of cases shifted to each state in relation to the number of judges in that state's court of general jurisdiction. As shown in Table 5 the transfer of this maximum number of diversity cases would impose an additional number of cases varying between 0.8 and 7.4 cases per judge in all states except Vermont and South Carolina.⁴⁸

TABLE 5
NUMBER OF DIVERSITY CASES SHIFTED
PER STATE TRIAL JUDGE

States	Number of State Trial Judges General Jurisdiction	Diversity Cases Shifted (1970 Data)	Diversity Cases Shifted Per State Trial Judge (Avg.)	Civil Terminations Per State Trial Judge (Avg.)
1st CIRCUIT				
Maine	11	34	3.1	—
Massachusetts	46	264	5.7	858
New Hampshire	10	40	4.0	1,268
Rhode Island	13	26	2.0	396
2nd CIRCUIT				
Puerto Rico	70	295	4.2	344
Connecticut	35	83	2.4	508
New York	225	1,132	5.0	336
Vermont	6	107	18.8/a	262

48. In Vermont there are 6 judges in the county courts, the courts of general jurisdiction. There are 10 judges in the district courts, Vt. STAT. ANN. § 444(a) (Supp. 1971). They have jurisdiction in civil cases for amounts up to \$5,000.

Thus when the 107 shifted cases are compared with the total number of judges in the State courts of major jurisdiction, the average number of cases shifted per judge is 6.7, a figure comparable with many other states.

It is of course true that since a claim for over \$10,000 must be made in all diversity cases they will apparently all go to the county courts. However a study of diversity cases in New York City, both settled and going to judgment, shows they do not all have high values. A substantial number of these cases are settled or reached judgment for less than \$10,000, many for under \$5,000.

THE SIXTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, COURT AND MONETARY BREAKDOWN OF CLOSING STATEMENT 292 (1970).

In South Carolina there are 16 Circuit Court judges in the trial courts of general jurisdiction. However, South Carolina has a very well developed system of county courts of limited jurisdiction, with substantial jurisdictional limits.

These county courts have jurisdiction in law and equity up to the amount shown:

Anderson—\$12,500—S.C. CODE ANN. § 15-631.11 (Supp. 1970).

Greenville—\$10,000—S.C. CODE ANN. § 15-654 (1962).

Marlboro—\$7,500—S.C. CODE ANN. § 15-696 (1962).

Orangeburg—\$10,000—S.C. CODE ANN. § 15-714 (1962).

Richland (2 judges)—\$10,000—S.C. CODE ANN. § 15-764 (1962).

Spartanburg—\$6,000—S.C. CODE ANN. § 15-804 (1962).

So we have expressed a comparison of the cases shifted to the major state trial courts (16 circuit plus these 8 county judges). However, it is recognized that since in all diversity cases a claim of over \$10,000 must be made most of the shifted cases would go to the circuit courts. Therefore it would be necessary in South Carolina to increase the jurisdictional limit of the county courts or appoint additional circuit court judges or a combination of both.

DIVERSITY JURISDICTION

17

3rd CIRCUIT

Delaware	12	19	2.1	403
New Jersey	78	255	3.3	427
Pennsylvania	254	1368 (780)*	5.9	101

4th CIRCUIT

Maryland	79	193	2.5	635
N. Carolina	49	193	4.0	317
S. Carolina	16	360	22.5/a	/b
Virginia	99	442	4.5	458
W. Virginia	32	178	5.5	/b

5th CIRCUIT

Alabama	80	539	6.7	—
Florida	144	328	2.3	655
Georgia	52	350	6.7	—
Louisiana	94	645	6.9	858
Mississippi	49	274	5.6	—
Texas	211	1,105	5.3	927

6th CIRCUIT

Kentucky	73	185	2.5	—
Michigan	116	496	3.9	730
Ohio	181	517	2.9	249
Tennessee	78	390	5.0	751

7th CIRCUIT

Illinois	567	679	1.9	132
Indiana	186	523	3.9	/b
Wisconsin	174	144	0.8	150

8th CIRCUIT

Arkansas	48	354	7.4	593
Iowa	76	132	1.7	469
Minnesota	68	190	2.7	244
Missouri	102	316	3.1	628
Nebraska	38	75	2.0	—
N. Dakota	19	29	1.5	247
S. Dakota	21	29	1.4	193

9th CIRCUIT

Alaska	11	45	4.1	—
Arizona	51	134	3.8	—
California	416	304	0.7	180
Hawaii	14	26	1.5	217
Idaho	24	36	2.0	450
Montana	28	52	1.5	/b
Nevada	18	37	2.0	—
Oregon	59	202	3.4	467
Washington	88	170	1.9	250

10th CIRCUIT

Colorado	74	118	1.6	266
Kansas	61	164	2.7	485
New Mexico	21	110	5.2	974
Oklahoma	138	337	2.5	—
Utah	22	68	3.1	—
Wyoming	11	26	2.4	/b

* *Supra* note 47 and related text.a/ *Supra* note 48 and related text.

b/ These states do not record civil terminations.

Column 4 of Table 5 shows the average number of civil terminations per judge in the 30 states. This figure can then be compared to the number of diversity cases shifted per judge. As can be seen, in most states the number of diversity cases shifted per trial judge ranges between approximately two and seven. While the number of terminations per state trial judge ranges for the most part between about 250 and 800. Therefore, the effect of this bill would only slightly increase the number of cases per state trial judge. And of course, most of these shifted cases would be settled without trial.⁴⁹

An example will illustrate the point. In Massachusetts the number of diversity cases shifted per state trial judge is 5.7 while the average number of civil terminations per state trial judge is 858.

Table 6 shows the number of diversity cases shifted to state courts compared to the annual increase in state civil litigation. It includes those states from which comparisons between 1969 and 1970 civil filings were available. This table demonstrates that the shift in diversity cases is not large in comparison to the annual fluctuation in state civil litigation.

In all states with an increase in civil litigation during 1970, the

TABLE 6
COMPARISON OF DIVERSITY CASES SHIFTED UNDER S.1876 TO THE
INCREASE IN CIVIL CASES COMMENCED: SELECTED STATES

	Civil Cases Filed '69	Civil Cases Filed '70	In- crease	Diversity Cases Shifted	Change in Civil Case Fil- ings Comp. to Div. Cases Shifted—%
California	97,997	103,749	5,752	304	5.3%
Connecticut	17,565	19,399	1,834	83	4.5%
Kansas	25,995/a	28,737/a	2,742	164	5.6%
Louisiana	99,139	105,439	6,300	645	10%
Maryland	50,384	53,667	3,283	193	6%
Massachusetts	41,736	41,047	—689	264	38.5%/b
Michigan	82,292	86,893	4,601	496	11%
Minnesota	15,533	16,924	1,391	190	13.5%
Missouri	59,037	71,166	12,129	316	2.6%
New Jersey	34,341	33,892	—449	255	57%/b
New York	69,783	75,809	6,026	1,132	19%
North Carolina	11,880	13,589	1,709	193	11.3%
North Dakota	4,344	4,973	629	29	4.6%
Oregon	17,401	19,682	2,281	202	9%
South Dakota	5,341	5,939	597	29	4.9%
Washington	57,423	60,569	3,146	170	5.4%

a/ The case filings for Kansas are from 1970 and 1971 respectively.

b/ In Massachusetts and New Jersey civil case filings were less in 1970 than 1969. However, the cases shifted are substantially fewer than the decrease in state cases so that a net reduction of the state caseload would still occur.

49. Over 83% of all diversity cases are concluded prior to trial (See Annual Report of the Director of the Administrative Office of the U.S. Courts, Table C4, at 245(b) (1970)).

number of diversity cases shifted were but a small fraction of that increase. In New York, where 1,100 cases would be shifted by the ALI proposal, these shifted cases were only 19 per cent of the 6,000 increase in civil filings. In all other states shown in Table 6 the diversity cases shifted were less than 11 per cent of the 1970 increase in civil filings.

Massachusetts and New Jersey showed a decrease in civil litigation between 1969 and 1970. Yet even in these two states, the decrease in state civil litigation was considerably larger than the number of diversity cases which would be shifted to the state courts.

Of particular interest to the readers of this article will be a summary of the information in the tables as it relates to the States of North Dakota and Minnesota.

North Dakota

In 1970, there were 4,973 civil cases filed in the district courts of North Dakota, as against a maximum of 29 diversity cases commenced in or removed to the United States District Court which would be transferred under this proposal (0.5 per cent). Of those 29 cases, three would remain removable to the federal courts, leaving a potential shift of only 26 cases. The maximum shift (29 cases) is only 4.6 per cent of the annual civil case *increase* (1969-70) in North Dakota.

There were 4,688 cases terminated in North Dakota in 1970. Since there are 19 district judges, the average number of terminations of a district judge is 247 cases. If the shifted cases were spread among the 19 judges, they would add 1.5 cases per judge or about 0.6 per cent of their average caseload.

Thus, the adoption of the present proposals would not, it appears, markedly affect the caseload of the North Dakota state courts or of its judges.

Minnesota

In the fiscal year 1970, there were 16,924 civil cases commenced in the district courts of Minnesota, the state courts of general jurisdiction, as against a maximum of 190 diversity cases brought in or removed to the United States District Court which would be transferred under this proposal (1.1 per cent). Of those 190 cases, approximately 70 would remain removable to the federal courts. If we assume that about half of these cases would be removed, then the actual shift of diversity cases would be between 150-160 cases. The maximum shift (190 cases) is 13.7 per cent (190/1391) of the annual civil case *increase* (1969-70) in Minnesota.

There were 16,576 civil cases terminated in Minnesota in 1970. Since there are 68 judges (excluding juvenile judges) in courts of general jurisdiction, the average number of civil terminations of a

district judge is 244 cases. If the shifted cases were spread among the 68 judges, they would add 2.73 cases per judge, or about 1 per cent of their average caseload.

Thus, the adoption of the present proposals would not, it appears, markedly affect the caseload of the Minnesota state courts.

Conclusion

My goal has been to furnish to the bar a concise explanation of the American Law Institute's recommended changes in the jurisdiction of federal courts, to summarize and explain the Institute's reasons for its diversity recommendations, and to demonstrate what impact these changes will have upon the state court systems.

This article is not to be taken as an indication of what final action will be taken by the Senate Subcommittee on Improvements in Judicial Machinery. Nor should one conclude that this article necessarily indicates my final judgment on S. 1876. The caseload study reported herein represents only one of many studies which will be made of this bill. In late September 1971, hearings were commenced on the bill. Only after these hearings have been concluded sometime in 1972 will any member of the Subcommittee be in a position to make a final evaluation of the merits of the bill.

However, it seems clear that a final evaluation should not be based merely upon the numerical effect of the bill upon the caseload of either the federal or the state courts. From time to time because of the important national needs, Congress has passed various legislative programs dealing with many problems traditionally handled by the states. For example, under the Dyer Act,⁵⁰ 4,090 cases were handled in the federal courts in 1970.⁵¹ Recently, Congress passed the Narcotics Rehabilitation Act⁵² which brought 2,011 cases into the federal courts in 1969 and 3,268 cases in 1970.⁵³ There were 3,511 narcotics cases, including over 2,000 marijuana cases tried in the federal courts in 1970, and in addition, over 1,000 cases of bank robbery.⁵⁴ Altogether these cases total almost 12,000, very nearly the amount of cases which would be transferred to the state courts under S. 1876.

The responsibility of Congress in finally passing upon S. 1876 is to assess the need for a revision of the division of jurisdiction between state and federal courts. In final analysis, if the need is found to exist and if the revision is, in fact, a principled one which

50. 18 U.S.C. § 2312 (1971).

51. Annual Report of the Director of the Administrative Office of the U.S. Courts, Table D2, at 267 (1970).

52. 18 U.S.C. §§ 4251-4255 (1971).

53. Annual Report of the Director of the Administrative Office of the U.S. Courts, Table 14, at 109 (1970).

54. Annual Report of the Director of the Administrative Office of the U.S. Courts, Table D2, at 267, 268 (1970).

will help to preserve and strengthen the dual system of courts in this country, then the American Law Institute's proposal may finally be enacted by Congress.

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DIVERSITY JURISDICTION: PAST, PRESENT, AND FUTURE*

JAMES WILLIAM MOORE† AND DONALD T. WECKSTEIN**

*Diversity jurisdiction has been a source of controversy in this country since the Constitutional Convention. Most of the writing in the area today, including the ALI's Study of the Division of Jurisdiction Between State and Federal Courts, recommends curtailing jurisdiction. Professors Moore and Weckstein, after providing a background of diversity from the earliest days to the present, present rather compelling reasons why diversity should be extended, not curtailed. Not the least of their suggestions is that *Strawbridge v. Curtiss* should be rejected in favor of a minimal diversity rule.*

For one hundred seventy-five years the federal trial courts have exercised jurisdiction in cases between citizens of different states. While there are other segments of federal jurisdiction as old as diversity, probably none is as controversial. From the beginning, proposals have been made to abolish or substantially curtail diversity jurisdiction and many words have been written in support of, or in opposition to, such proposals. But we go further. We contend that experience and sound future planning justify an extension rather than a curtailment of many phases of diversity jurisdiction. To evaluate where diversity should be going, it is best first to understand where it has been and where it is now.

I. PAST

While surprisingly little information is to be found in the records of the Constitutional Convention on the basis for the federal judicial power,¹ it is known that the lack of an organized national judiciary was considered as one of the major defects of the Union under the Articles of Confederation.² Thus,

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¹ FARRAND, *THE FRAMING OF THE CONSTITUTION* 154 (1913).

² *Id.* at 50; FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 8-9 (1928); *THE FEDERALIST* No. 22, at 116 (Colonial ed. 1901) (Hamilton); HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 4-9 (1928); 2 STORY, *COMMENTARIES ON THE*

when the representatives of the several states met in Philadelphia in 1787 to consider ways of reforming the Confederation, all of the comprehensive proposals contained provisions for a national judiciary.³ All except one of these plans specifically provided for federal jurisdiction of cases in which foreigners may be interested,⁴ but only the plan presented by Governor Randolph of

Constitution 391 (5th ed. 1891); Murphy, *State Sovereignty and the Drafting of the Constitution*, 32 MISS. L.J. 155, 156 (1961). Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3 (1948), probably accurately remarks that the judiciary was not one of the most pressing problems confronting the Constitutional Convention which had originally convened to consider ways of correcting defects in the Articles of Confederation. Some commentators have maintained that diversity jurisdiction was not responsive to difficulties found under the Confederation. Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 520 (1924); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 (1928). But see Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 871 n.2, n.13 (1913).

³ Tansill, *Documents Illustrative of the Formation of the Union of the American States*, H.R. Doc. No. 398, 69th Cong., 1st Sess. 955 (Virginia Plan), 965 (Pinckney Plan), 963 (New Jersey Plan), 980 (Hamilton Plan) (1927) [hereinafter referred to as *Documents*]. The convention probably also had before it a fifth plan regarding only the judiciary which was in the handwriting of John Blair of Virginia, but the journals of the convention do not reveal any discussion of this plan. See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 8-9, 18 (1953). The vote was unanimous on the establishment of a national judiciary. *Documents* at 153, 400 (Madison's notes), 753 (Yates' notes). But there was a dispute on the need for inferior federal courts, which was compromised by giving Congress the authority to establish them. *Documents* at 153, 157-59, 405 (Madison's notes), 849 (King's notes).

In addition to *Documents*, the proceedings of the Constitutional Convention have been published in FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* (1911), including the notes of Madison, Yates, and others; 5 ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION (MADISON'S PAPERS)* (1866); and summarized with interpretation in FARRAND, *THE FRAMING OF THE CONSTITUTION* (1913). Footnote references will be to the latter Farrand book and *Documents* since they are the most readily accessible today. *Documents* is probably the most complete record. It contains the notes of Madison, Yates, King, Paterson, Hamilton, McHenry, and Pierce. References herein will be to Madison's notes unless indicated otherwise.

⁴ The Virginia Plan as presented by Edmund Randolph awarded jurisdiction of the supreme and inferior tribunals in

all piracies and felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.

Documents at 955. The New Jersey Plan as presented by William Paterson conceived a supreme tribunal to have original jurisdiction of impeachments and appellate jurisdiction in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies & felonies on the high Seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade, or the collection of federal revenue

Documents at 969. As to this latter quotation, variant text read "[I]n all cases in which Foreigners may be interested in the construction of any Treaty or Treaties"

Documents at 973, 977. The Hamilton Plan proposed a supreme court to have original jurisdiction in all causes of capture, and an appellate jurisdiction in all causes in which the revenues of the general Government or the Citizens of foreign Nations are concerned.

Documents at 980. The Pinckney Plan of South Carolina outlined a federal judicial court, to which an Appeal shall be allowed from the judicial Courts of the several States in all Causes wherein Questions shall arise on the Construction of Treaties made by U.S.—or on the Laws of Nations—or on the Regulations of U.S. concerning Trade and Revenue—or wherein U.S. shall be

Virginia specifically included cases in which "citizens of other States" may be interested.⁵ Nevertheless it was the Virginia plan which served as the main basis for discussion by the convention.⁶ The convention resolved itself into a committee of the whole to consider the Virginia resolutions, and, when it deliberated the scope of federal court jurisdiction, the specific grants contained in the Virginia resolution were dropped in favor of the general principle that the jurisdiction should extend to "all cases arising under the national laws and to such other questions as may involve the national peace and harmony."⁷ This resolution, along with the others which had received preliminary approval, was referred to a committee to prepare the detailed wording of the Constitution.⁸ The report of the Committee of Detail again specified the extent of the national judicial power including therein, "controversies . . . between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects."⁹ Thus, it seems a fair inference that diversity as well as alienage jurisdiction were thought to be included within the general phrase "questions as may involve the national peace and harmony."¹⁰ Although the Convention made some subsequent amendments to the judiciary article, most of which tended towards enlargement of federal jurisdiction, the inclusion of diversity and alienage within the scope of the jurisdiction was apparently unchallenged.¹¹

The lack of recorded opposition in the Constitutional Convention should

a Party—The Court shall consist of Judges to be appointed during good Behavior—S. and H.D. in C. ass. [Senate and House of Delegates together in Congress assembled] shall have the exclusive Right of instituting in each State a Court of Admiralty and appointing the Judges etc. to the same for all maritime Causes which may arise therein respectively.

Documents at 965. The above plans have sometimes appeared in variant texts, but, except as noted, the texts do not differ materially in regard to jurisdiction. See *Documents* at 953-88. The Blair Plan also provided for jurisdiction where foreigners were interested. HART & WECHSLER, *op. cit. supra* note 3, at 22-25. See also FARRAND, *op. cit. supra* note 1, at 70, 86, 227-28, 231; Friendly, *supra* note 2, at 484-85.

⁵ *Documents* at 955.

⁶ FARRAND, *op. cit. supra* note 1, at 68, 72, 89. After the New Jersey Plan was submitted, the Committee of the Whole voted to re-report the amended Virginia resolutions as preferable to the New Jersey ones. *Documents* at 234 (Madison's notes), 785 (Yates' notes).

⁷ FARRAND, *op. cit. supra* note 1, at 119. When the matter of jurisdiction first came to a vote, the resolution was amended to cases in which foreigners or citizens of "two distinct States of the Union" may be interested. *Documents* at 198. The detailed jurisdictional clause was then dropped in favor of "cases, which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony." *Id.* at 198, 768 (Yates' notes). In the report of the Committee of the Whole, the clause appears in the same form. *Id.* at 202-03 (Madison's notes), 883 (Patterson's notes), re-reported, 236. On Madison's motion, it was then amended to read as it appears in the text, *id.* at 405, and was referred in somewhat the same form to the Committee of Detail. *Id.* at 465, 469.

⁸ The plans of New Jersey (Paterson) and Pinckney were also referred to the Committee of Detail. *Documents* at 471.

⁹ *Documents* at 479; FARRAND, *op. cit. supra* note 1, at 155-56.

¹⁰ See HART & WECHSLER, *op. cit. supra* note 3, at 19.

¹¹ FARRAND, *op. cit. supra* note 1, at 155-56; see Friendly, *supra* note 2, at 486-87.

not be taken as an indication of complete acceptance of diversity jurisdiction.¹² Sharp attacks were soon launched in the state ratifying conventions, the first Congress, and the press.¹³ The question of whether or not to create inferior federal courts had aroused considerable discussion in the Constitutional Convention but had been compromised by a provision for a supreme court in the Constitution itself and a grant to Congress of the power to create any inferior courts which were needed.¹⁴ The anti-Federalists then combined their attack on the existence of lower federal courts with their fears of the extent of the jurisdiction that such courts would exercise. Diversity jurisdiction, it was argued, would lead to the complete attenuation of state courts, to the application of federal law to state causes of action, and to oppressive costs in defending federal cases especially on appeal where long journeys to the court often would be necessary.¹⁵ Opponents also contended that the state courts were quite capable of handling the diversity litigation and even more capable than federal courts would be in applying state law.¹⁶

Consequently, the First Congress of the newly formed United States encountered the dual problem of legislating for the national government while at the same time considering amendments to the Constitution which tended to restrict its own powers. Thus, while a Senate committee debated to what extent diversity jurisdiction should be vested in the inferior courts, the House was confronted with constitutional amendments to eliminate both diversity jurisdiction and inferior courts.¹⁷ Nevertheless the necessity of implementing some national judicial power was recognized, and Senate Bill No. 1 was introduced in the first session of Congress to accomplish this.¹⁸

¹² HART & WECHSLER, *op. cit. supra* note 3, at 24-25. There are indications that parts of the judiciary article were purposely left ambiguous in order to avoid dissension in the convention. See 2 THORPE, *CONSTITUTIONAL HISTORY OF THE UNITED STATES* 265-66 (1901); Nathanson, Book Review, 49 NW. U.L. REV. 118, 131-32 (1954).

¹³ HART & WECHSLER, *op. cit. supra* note 3, at 27-29; Doub, *Time for Re-Evaluation: Shall We Curtail Diversity Jurisdiction?*, 44 A.B.A.J. 243, 244 (1958); Friendly, *supra* note 2, at 487-88; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 56, 81-82, 123-27 (1923). Frank, *supra* note 2, at 3, maintains that the attacks on diversity did not equal in proportion the criticism of several other parts of the Constitution.

¹⁴ *Documents* at 153, 157-59, 405 (Madison's notes), 849 (King's notes); FARRAND, *op. cit. supra* note 1, at 79-80, 154-55; Frank, *supra* note 2, at 9-11.

¹⁵ Friendly, *supra* note 2, at 490-92; Phillips & Christenson, *The Historical and Legal Background of the Diversity Jurisdiction*, 46 A.B.A.J. 959, 963 (1960); see Warren, *supra* note 13, at 67-69, 123-27. According to at least one writer, the first two of these fears were in part justified, and the fact that they have not been realized is due to a misconstruction of the Constitution. See 1 CROSSKEY, *POLITICS AND THE CONSTITUTION* 558-62, 593, 618-20, 644-48 (1953). In regard to the third objection, it may be noted that in a recent survey of reasons why attorneys select federal forums for diversity cases, the most frequent reason given was geographic convenience (18.3% of all reasons given). Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 937-38 (1962).

¹⁶ Friendly, *supra* note 2, at 491-92; see note 14 *supra*.

¹⁷ See Friendly, *supra* note 2, at 500, 502; Warren, *supra* note 13, at 111-31.

¹⁸ See Warren, *supra* note 13, at 49.

The draft bill was prepared by a committee which included Ellsworth, Paterson, and others who had served in the Constitutional Convention, as well as the ardent state's righter, Richard Henry Lee.¹⁹ It cannot be doubted that the committee was aware of the purposes of the Constitutional Convention, but the climate had changed from concern for national unity to concern for individual's and state's rights. Thus the bill which was reported was a compromise between those who would have vested all of the judicial power and those who opposed vesting any but the minimum essential to immediate survival.²⁰

The first draft considered by the committee limited diversity and alienage jurisdiction to suits brought "against" a foreigner or citizen of another state,²¹ but the bill approved by the committee covered suits in which "a foreigner or citizen of another State than that in which the suit is brought is a party" whether as plaintiff or defendant.²² The Senate then restricted the jurisdiction to suits where "an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State,"²³ and the bill was enacted in that form.²⁴

It should be observed that the Judiciary Act of 1789 did not extend to the constitutional limits for diversity jurisdiction but exceeded those for alienage. For example, although "citizens of different states," a citizen of Virginia could not sue a citizen of New York in the circuit court of Rhode Island (notwithstanding personal service on the defendant in Rhode Island) since neither party was a citizen of the state where the suit was brought.²⁵ On the other hand, even though the pleadings conformed to the statutory

¹⁹ *Id.* at 57-62; Friendly, *supra* note 2, at 500.

²⁰ See Warren, *supra* note 13, at 52-55, 62, 67-69. See also Friendly, *supra* note 2, at 487-88. At the time there were many who believed that Congress was required to vest all the jurisdiction included in article III, but political necessity and judicial interpretation eventually made this view obsolete. See MOORE, *FEDERAL PRACTICE* §§ 0.7[1], 38.03[1] (2d ed. 1961) [hereinafter cited as MOORE]; Warren, *supra* note 13, at 67-69.

²¹ Warren, *supra* note 13, at 78 n.67.

²² *Id.* at 78.

²³ *Id.* at 79; Friendly, *supra* note 2, at 501. The evolution of the wording of the act indicates that Congress was most concerned with protecting against local prejudice which would benefit a local party to the detriment of the out-of-state party.

²⁴ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78:

And be it further enacted, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

²⁵ *White v. Fenner*, 29 Fed. Cas. 1015 (No. 17547) (C.C.R.I. 1818). A similar limitation is now contained in the venue statute, 28 U.S.C. § 1391(a) (1958). See MOORE § 0.142[3]. As a jurisdictional limitation, it can not be waived by voluntary appearance, but such appearance will be considered as a waiver of the venue limitation. *Compare Kitchen v. Strawbridge*, 14 Fed. Cas. 692 (No. 7854) (C.C. Pa. 1821), *with Jones v. Andrews*, 77 U.S. (10 Wall.) 327 (1870). See discussion in *Ober v. Gallagher*, 93 U.S. 199, 204 (1876); MOORE § 0.140[1-2].

language by alleging that an alien is a party, but without specifically alleging the citizenship of the other party, the Supreme Court found the jurisdictional allegation defective in that the statute must be read as limited by the Constitution to controversies "between a state, or the citizens thereof, and foreign states, citizens or subjects."²⁶

Original diversity and alienage jurisdiction was vested in the circuit courts,²⁷ which were also given jurisdiction of civil suits removed from a state court by a defendant who was an alien, or by a citizen of another state when sued by a citizen of the state where the suit was brought.²⁸

The act of 1789 restricted diversity and alienage jurisdiction by a requirement that the matter in dispute exceed, exclusive of costs, the sum or value of 500 dollars,²⁹ and by the assignee clause which prohibited suits by an assignee of a chose in action (except foreign bills of exchange) unless his assignor could have sued on the note in the same federal court.³⁰

The Judiciary Act of 1789—like many compromise measures—left most factions unsatisfied, and it was envisioned that extensive changes would have to be made soon after the federal courts began functioning.³¹ Nevertheless, with the exception of the "Midnight-Judges" Act of 1801 which was repealed a few months after its enactment,³² the provisions relating to trial court jurisdiction were not substantially altered until almost a century later in 1875.³³

During this period, however, there were several court decisions which had significant effects on the scope of federal jurisdiction. In 1806, Mr. Chief Justice Marshall, speaking for the court in *Strawbridge v. Curtiss*,³⁴ declared that under the Judiciary Act of 1789 diversity jurisdiction does not exist merely because one of the defendants is a citizen of a different state than

²⁶ *Hodgson & Thompson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); see ROSE, *FEDERAL JURISDICTION AND PROCEDURE* 22-23 (5th ed. 1938); Warren, *supra* note 13, at 79; 55 *YALE L.J.* 600 n.4 (1946). Congress later conformed the alienage provision to the words of the Constitution. Act of March 3, 1875, ch. 137, 18 Stat. 470.

²⁷ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; see MOORE ¶ 0.3[2].

²⁸ Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79; see MOORE ¶ 0.156[1]; Warren, *supra* note 13, at 90-91.

²⁹ Judiciary Act of 1789, ch. 20, §§ 11-12, 1 Stat. 73, 78, 79; see MOORE ¶ 0.90[1]. Apparently the jurisdictional amount was designed to prevent defendants from being summoned long distances to defend small claims. See HART & WECHSLER, *op. cit. supra* note 3, at 39. The expense and inconvenience of attending federal courts was one of the principal reasons for opposition to the establishment of such courts. See note 15 *supra*.

³⁰ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; see MOORE ¶ 17.06; Warren, *supra* note 13.

³¹ Warren, *supra* note 13, at 52-55, 130-31.

³² Act of Feb. 13, 1801, ch. 4, 2 Stat. 89, repealed by Act of March 8, 1802, ch. 8, 2 Stat. 132. The act, which had vested, subject to a four-hundred dollar jurisdictional amount, the full breadth of the federal court jurisdiction cognizable under the Constitution, was passed in the last days of the Federalist regime and created several new federal judgeships. This gave rise to cries of "midnight" appointments and the act was repealed the next year soon after Jefferson took office as President. For a defense of the act, see 2 CROSSKEY, *op. cit. supra* note 15, 757-61.

³³ See also notes 39-43 *infra* and accompanying text.

³⁴ 7 U.S. (3 Cranch) 267 (1806).

several of the plaintiffs, but that each person representing a distinct interest must be of diverse citizenship from each party of adverse interests. This case was also influential in a series of decisions involving the status of corporations for purposes of diversity jurisdiction. The Constitution and the Judiciary Act of 1789 had been silent on the subject,³⁵ and the Supreme Court attempted to fill the void. It first ruled that a corporation was not a citizen but could be sued in the federal courts if the citizenship of each of its members was diverse from that of the opposing party.³⁶ This decision virtually denied diversity jurisdiction of any actions involving large or widely-held corporations. But the trend was reversed in 1844 when the Court held that a corporation could be treated as a citizen for purposes of diversity jurisdiction.³⁷ Then in 1853, the Court adopted a "conclusive presumption" that all of a corporation's stockholders were citizens of the state of incorporation.³⁸ Thus, by virtue of this fiction, a corporation, for diversity purposes, could sue and be sued as, in effect, a citizen of the state of its incorporation.

The jurisdictional growth of the federal courts crested with the Act of March 3, 1875. In addition to vesting general federal question jurisdiction,³⁹ the act redefined diversity and alienage in the words of the Constitution, giving the circuit courts jurisdiction of civil suits, involving in excess of 500 dollars exclusive of costs, "in which there shall be a controversy between citizens of different States . . . or . . . between citizens of a State and foreign States, citizens or subjects."⁴⁰

Removal jurisdiction of diversity suits also reached its apogee under the 1875 act. It authorized *either* a plaintiff or a defendant to remove, and eliminated the restriction that one of the parties be a citizen of the state where the action was brought. In addition, when there existed in a multi-party suit in a state court a controversy wholly between citizens of different states which could be fully determined as between them, and the jurisdictional amount was present, then either one or more of the plaintiffs or defendants interested in such controversy could remove the *entire* suit to the proper federal court.⁴¹

³⁵ See Warren, *supra* note 13, at 89-90. For about fifteen years after the adoption of the Constitution, corporations sued and were sued in the federal courts apparently without any question of jurisdiction being raised. See F. Green, *Corporations As Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202, 211 (1946).

³⁶ Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809). For a more complete development of the law regarding corporations and diversity jurisdiction, see MOORE ¶ 0.76 (to be published in late 1964); Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1427-30 (1964).

³⁷ Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497 (1844).

³⁸ Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314 (1853).

³⁹ Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470; see MOORE ¶¶ 0.2[1], 0.60[8.-3].

⁴⁰ Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

⁴¹ Act of March 3, 1875, ch. 137, § 2, 18 Stat. 470; Barney v. Latham, 103 U.S. 205 (1880); see MOORE ¶¶ 0.156[1], 0.162, 0.163[1].

The restriction of the assignee clause of the Judiciary Act of 1789 was modified to allow a holder of a negotiable promissory note or bill of exchange to sue if his citizenship was diverse from that of the defendant regardless of whether or not the assignor would have been able to sue in federal court.⁴² However, the 1875 act directed the circuit courts to dismiss or remand a suit which "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court" or in which the parties have been improperly or collusively joined for the purpose of creating federal jurisdiction.⁴³

Tending further to increase the business of the federal courts was an 1878 judicial interpretation of the venue provisions of the 1875 act. Like the 1789 Judiciary Act,⁴⁴ the act of 1875⁴⁵ permitted civil proceedings against a defendant in any district "whereof he is an inhabitant, or in which he shall be found at the time of serving . . . process." This provision was interpreted as allowing suits against a corporation in any state where it had designated an agent for service of process.⁴⁶

It was not long before the federal courts were deluged with new business made possible by the act of 1875, and efforts began toward restricting their jurisdiction in order to reduce the overload.⁴⁷ Many of the restrictions which were adopted were contained in the acts of 1887-1888.⁴⁸ The provisions of these acts which affected diversity (1) raised the jurisdictional amount from an amount in excess of 500 dollars to an amount in excess of 2,000 dollars exclusive of interests and costs;⁴⁹ (2) withdrew the right of removal from plaintiffs and limited removal of diversity actions to nonresident defendants;⁵⁰ (3) restored the pre-1875 restrictions of the assignee clause, excluding from

⁴² Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. The act also broadened the scope of the clause by including "any suit founded on contract in favor of an assignee" instead of merely suits "to recover the contents of any promissory note or other chose in action."

⁴³ Act of March 3, 1875, ch. 137, § 5, 18 Stat. 472.

⁴⁴ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

⁴⁵ Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

⁴⁶ *Ex parte Schollenberger*, 96 U.S. 369 (1877); see MOORE ¶ 0.142[5.-3].

⁴⁷ See FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 89-90 (1928); HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 45-46 (1953).

⁴⁸ Act of March 3, 1887, ch. 373, 24 Stat. 552, as amended, Act of Aug. 13, 1888, ch. 866, 25 Stat. 433. Another restriction was effected by the Act of July 12, 1882, ch. 290, 22 Stat. 162, 163, which eliminated federal incorporation of national banks as a basis for federal question jurisdiction. See MOORE ¶ 0.60[8.-3]. And for purposes of diversity jurisdiction of suits involving national banks, the banks were declared to be citizens of the states in which they were respectively located. Act of March 3, 1887, ch. 390, § 4, 24 Stat. 554; Act of Aug. 13, 1888, ch. 866, § 4, 25 Stat. 436.

⁴⁹ Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552; Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433.

⁵⁰ Act of March 3, 1887, ch. 373, § 2, 24 Stat. 553; Act of Aug. 13, 1888, ch. 866, § 2, 25 Stat. 434. But the act retained the right of a defendant to a separable controversy involving diverse citizens to remove the entire suit. *Ibid.*; see MOORE ¶ 0.156[1].

its coverage only corporate bearer notes and (as had been excepted formerly) foreign bills of exchange,⁵¹ and (4) restricted venue to the district where a defendant was an inhabitant (not where he might be found), with the exception that in diversity suits only, venue was proper in the district of the residence of the plaintiff or the defendant.⁵² According to a Supreme Court decision a few years later, a corporation was deemed an inhabitant and a resident only of the state where it was chartered, and thus in a diversity suit venue could be laid only in that state or where the opposite party resided.⁵³

Various other attempts were made during this period to curtail or completely eliminate diversity jurisdiction, especially in regard to corporate parties, but these proposals failed to gain final approval.⁵⁴

The Judicial Code of 1911 further restricted the diversity cases which could be brought into the federal courts by raising the jurisdictional amount to an amount in excess of 3,000 dollars, exclusive of interest and costs.⁵⁵ This act also abolished the circuit courts and transferred their trial jurisdiction to the district courts.⁵⁶ Subsequent legislation imposed limitations upon the federal courts' jurisdiction to issue injunctions, notwithstanding existence of diversity of citizenship, in certain cases involving labor disputes, state taxes, and state public utility rates.⁵⁷

An exception in the policy of narrowing federal diversity jurisdiction⁵⁸ was the Federal Interpleader Act of 1917, which, in order to meet a particular

⁵¹ Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552; Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433.

⁵² Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552; Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433.

⁵³ *Shaw v. Quincy Mining Co.*, 145 U.S. 444 (1892); see MOORE ¶ 0.142[5.-3].

⁵⁴ See listing and related discussion in FRANKFURTER & LANDIS, *op. cit. supra* note 47, at 89-93, 136-41; Doub, *Time for Re-Evaluation: Shall We Curtail Diversity Jurisdiction?*, 44 A.B.A.J. 243, 280-81 (1958); Warren, *Corporations and Diversity of Citizenship*, 19 VA. L. REV. 661, 673-84 (1933). Proposals were also offered or supported by the law review commentators. See, e.g., Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 515-16, 520-30 (1928); Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A.B.A.J. 71, 149, 265 (1933). See also McGovney, *A Supreme Court Fiction*, 56 HARV. L. REV. 1225 (1943).

⁵⁵ Judiciary Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091.

⁵⁶ Judiciary Act of 1911, ch. 231, §§ 24, 289-91, 36 Stat. 1087, 1091, 1167. The Evarts Act of 1891, ch. 517, 26 Stat. 826, had already eliminated the appellate jurisdiction of the circuit courts and had created the circuit courts of appeal to act as the intermediate appellate courts. See MOORE ¶¶ 0.2[1], 0.3[2].

⁵⁷ Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1958); Johnson Act of May 14, 1934, ch. 283, 48 Stat. 775; Act of Aug. 21, 1937, ch. 726, 50 Stat. 738; see MOORE ¶¶ 0.60[1], 0.71[5], 0.206, 0.207.

⁵⁸ See *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76, rehearing denied, 314 U.S. 714 (1941) (Frankfurter, J.):

The dominant note in the successive enactments of Congress relating to diversity jurisdiction, is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of "business that intrinsically belongs to the state courts," in order to keep them free for their distinctive federal business.

See also HART & WEICSLER, *op. cit. supra* note 47, at 46 n.44.

deficiency, granted jurisdiction of interpleader suits involving 500 dollars or more when two or more adverse claimants were citizens of different states.⁵⁹ This act has been construed as modifying the doctrine of *Strawbridge v. Curtiss* in that only minimal diversity is required.⁶⁰ In other words, it is sufficient if any one of the adverse claimants is of diverse citizenship from any other claimant regardless of the citizenship of the other claimants or the stakeholder.

Another relatively minor expansion of diversity was accomplished in 1940 by the extension of the jurisdiction to controversies between "citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory."⁶¹ Whether Congress could validly confer this jurisdiction on the district courts created pursuant to article III presented a controversial question which the Supreme Court, by a combination of conflicting minorities, settled in favor of constitutionality.⁶²

II. PRESENT

The present scope of diversity jurisdiction is spelled out in the Judicial Code of 1948,⁶³ as amended, especially in 1958.⁶⁴ The Code reenacted in revised form the basic statutory provisions adopted through 1940, thus giving the district courts jurisdiction of civil actions between "citizens of different States." The word "States" was defined to include the territories and the District of Columbia, and, by a clarifying amendment in 1956, the Commonwealth of Puerto Rico.⁶⁵ In addition, the Code merged diversity and alienage jurisdiction and adopted the sensible rule that jurisdiction would exist in a suit between citizens of different states although aliens were additional parties. Thus, original jurisdiction now exists in a suit between citizens of different states, between a citizen of a state and an alien, or between a citizen of the District of Columbia or a territory and a citizen of a state, foreign country or another territory.⁶⁶

Removal jurisdiction was also clarified and revised by the Code of 1948. While generally keyed to original diversity jurisdiction, removal is somewhat narrower in that, notwithstanding the existence of diversity of citizenship,

⁵⁹ Act of Feb. 22, 1917, ch. 113, 39 Stat. 929, eventually replaced by Act of Jan. 20, 1936, 28 U.S.C. § 1335 (1958). For background and subsequent history, see MOORE ¶ 22.06.

⁶⁰ *Haynes v. Felder*, 239 F.2d 868 (5th Cir. 1957); MOORE ¶ 22.09.

⁶¹ Act of April 20, 1940, ch. 117, 54 Stat. 143.

⁶² *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949); see MOORE ¶¶ 0.60[8.-4].

⁶³ Act of June 25, 1948, ch. 646, 62 Stat. 869, 930.

⁶⁴ 28 U.S.C. § 1332 (1958). See notes 74-89 *infra* and accompanying text.

⁶⁵ 28 U.S.C. § 1332(d) (1958); see *Detres v. Lion Bldg. Corp.*, 234 F.2d 596 (7th Cir. 1956); MOORE ¶ 0.60[8.-4].

⁶⁶ See Reviser's Note, 28 U.S.C. § 1332 (1958); MOORE ¶ 0.60[8.-4].

an action cannot be removed if the defendant is a citizen of the state where the suit was brought. Removal, however, is also broader than original jurisdiction in certain cases involving joinder of claims. The provision which allowed removal of a case on the basis of a separable controversy was replaced in the 1948 Code by one providing for the removal of an entire suit, with discretion in the trial court to remand all matters not otherwise within its jurisdiction, whenever a separate and independent claim which would be removable if sued upon alone is joined with one or more otherwise non-removable claims.⁶⁷ In addition, a post Civil War enactment which authorized removal by an out-of-state litigant on the basis of apprehended prejudice or local influence was discarded as unnecessary and undesirable.⁶⁸

The 1948 Code carried forward the principal statutory limitations on diversity jurisdiction⁶⁹ with the exception of the assignee clause.⁷⁰ However, the original purpose of that clause was thought to be substantially fulfilled by the provision denying jurisdiction to a district court, "of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."⁷¹

The general venue provisions of the Code permitted a corporation to be sued in any district in which it was incorporated, licensed to do business, or was doing business.⁷² This result had already been partially attained by a 1939 Supreme Court decision which had determined that a foreign corporation by qualifying to do business in a state and appointing an agent to receive process from the courts of that state had likewise consented to be sued in a diversity suit in the federal courts of that state.⁷³

In order to relieve some of the burden of business in the federal courts and to correct asserted abuses of diversity jurisdiction,⁷⁴ the amendatory Act

⁶⁷ 28 U.S.C. § 1441(c) (1958); see MOORE ¶¶ 0.156[2]-[4], 0.163.

⁶⁸ See Reviser's Note, 28 U.S.C. § 1441 (1958); MOORE ¶ 0.156[3]-[4].

⁶⁹ Johnson Act of May 14, 1934, ch. 283, 48 Stat. 775, which sharply curtailed federal jurisdiction to enjoin state rate orders, was carried forward into 28 U.S.C. § 1342 (1958); see MOORE ¶ 0.206. The Act of Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738, which sharply curtailed federal jurisdiction to enjoin the collection of state taxes, was carried forward into 28 U.S.C. § 1341 (1958); see MOORE ¶ 0.207. The Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932), which sharply curtailed federal jurisdiction to issue labor injunctions, was unaffected by the Code of 1948, 29 U.S.C. §§ 101-15 (1958); see MOORE ¶ 2.08[5].

⁷⁰ See notes 30 & 51 *supra*; MOORE ¶ 17.06.

⁷¹ 28 U.S.C. § 1359 (1958) and Reviser's Note thereunder. This clause was a condensed version of the assignee clause and of the general prohibition against collusive attempts to create federal jurisdiction which was first enacted by the Act of March 3, 1875, ch. 137, 18 Stat. 470; see MOORE ¶ 17.05.

⁷² 28 U.S.C. § 1391(c) (1958); see MOORE ¶ 0.142[5.-3].

⁷³ *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), 128 A.L.R. 1447 (1940); see MOORE ¶ 0.142[5.-3].

⁷⁴ S. REP. NO. 1830, 85th Cong., 2d Sess., 2 U.S. CODE CONG. & AD. NEWS 3099 (1958); see MOORE ¶¶ 0.60[8.-3]-[8.-4].

of July 25, 1958 was passed.⁷⁵ Most significantly, it provided that for both original and removal diversity jurisdiction, "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."⁷⁶

This amendment accomplished at least two innovations in the Judicial Code. First, without relying on the judicially-created fictional presumption of the citizenship of a corporation's members, it gave legislative recognition to the doctrine that a corporation may be treated as a citizen of the state of its incorporation.⁷⁷ And it may have gone further by making a corporation a citizen of "every" state in which it is incorporated, thus eliminating the pre-existing doctrine whereby a corporation which was incorporated in more than one state would be treated only as a citizen of the state in which suit was brought as long as it was incorporated in that state.⁷⁸ Secondly, the amendment gave a dual citizenship to those corporations which have their principal place of business in a state other than the one in which they are incorporated.⁷⁹ Thus a "local" corporation is no longer able to gain access to the federal courts merely because it has been chartered in another state, and a substantial curtailment of diversity jurisdiction has been accomplished. For example, a corporation which is incorporated in Delaware but has its principal place of business in Texas can no longer, on the basis of diversity jurisdiction, sue or be sued by a citizen of Texas in the federal courts, nor can it remove such a suit, nor remove a suit brought in a Texas court by a citizen of any other state since the corporation is now a citizen of the state where the action was brought.⁸⁰

The 1958 amendment also restricted diversity jurisdiction by increasing the jurisdictional amount from an amount in excess of 3,000 dollars to an amount in excess of 10,000 dollars, exclusive of interest and costs.⁸¹ This provision likely has its greatest impact on litigation where the damages are liquidated or cannot exceed a fixed amount as would be the case in a "direct-action" suit on an insurance policy of 10,000 dollars or less. But to discourage

⁷⁵ 28 U.S.C. § 1332 (1958).

⁷⁶ 28 U.S.C. § 1332(c) (1958).

⁷⁷ See notes 37 & 38 *supra* and accompanying text; MOORE ¶¶ 0.60[8.-4], 0.76; WRIGHT, FEDERAL COURTS § 27 (1963). *But cf.* Moore-McCormack Lines, Inc. v. Ingalls Shipbuilding Corp., 194 F. Supp. 412, 413 (S.D.N.Y. 1961).

⁷⁸ See Weckstein, *Multi-State Corporations and Diversity of Citizenship: A Field Day For Fictions*, 31 TENN. L. REV. 195 (1964).

⁷⁹ See MOORE ¶¶ 0.60[8.-4], 0.77; WRIGHT, FEDERAL COURTS § 27 (1963). There are many problems involved in determining which corporations have a dual citizenship and where a corporation's principal place of business is located. See Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1431-45 (1964).

⁸⁰ *Ibid.*; e.g., Canton v. Angelina Cas. Co., 279 F.2d 553 (5th Cir. 1960); Evans-Hailey Co. v. Crane Co., 207 F. Supp. 193, 197 (M.D. Tenn. 1962); see 28 U.S.C. § 1441(b) (1958); MOORE ¶¶ 0.161[1], 0.161[3.-1].

⁸¹ 28 U.S.C. § 1332(a) (1958).

the assertion of inflated claims in other actions, a provision was added to allow the district court to deny costs to the plaintiff or impose them on him if he is finally adjudged to be entitled to less than 10,000 dollars, computed without regard to any setoff or counterclaim.⁸² This may have the desired effect, but the provision adds little to the existing powers of the district court. Rule 54(d) already permits the court to deny costs to a prevailing plaintiff where the circumstances justify it, and the small amount of taxable costs is not likely to deter a plaintiff who is intent on having his case heard in the federal courts.⁸³ Under established doctrine, a federal court will dismiss an action for lack of jurisdiction if it believes that the amount in controversy could not, in good faith, be claimed to be above the jurisdictional amount.⁸⁴ While the new costs provision should not license the district courts to relax their scrutiny of the amount in controversy in determining jurisdiction, once a case has been heard on the merits it will usually better serve the interests of justice and judicial economy to assign costs against a plaintiff awarded a judgment of less than the jurisdictional amount, than to dismiss the action for want of jurisdiction.⁸⁵

Another provision added by the 1958 amendment affects litigation in Texas and a few other states where a civil action may be brought to fix liability for workmen's compensation. Removal from a state court of such actions arising under that state's workmen's compensation laws is prohibited,⁸⁶ but removal of such an action arising under another state's laws is not precluded, nor is an employee or other party prevented from filing an *original* action in federal court arising under a state's compensation laws.⁸⁷

The citizenship classifications of corporations were slightly altered by the addition in 1964 of a proviso to section 1332(c) which deems an insurer, whether incorporated or unincorporated, to be a citizen of the state of the insured in a direct action against the insurer in which the insured is not joined as a party defendant.⁸⁸ Thus a citizen of Louisiana or Wisconsin will no longer be able to invoke diversity jurisdiction by directly suing an out-of-state liability insurance carrier of a local tortfeasor. Such an insurance com-

⁸² 28 U.S.C. § 1332(b) (1958).

⁸³ See MOORE ¶¶ 54.70[1], 54.77.

⁸⁴ See MOORE ¶ 0.92[1].

⁸⁵ See Cowen, *Federal Jurisdiction Amended*, 44 VA. L. REV. 971, 977 (1958); cf. Bochenek v. Germann, 191 F. Supp. 104 (E.D. Mich. 1960); Stachon v. Hoxie, 190 F. Supp. 185 (W.D. Mich. 1960), 45 MARQ. L. REV. 117 (1961); Comment, 58 COLUM. L. REV. 1287, 1291 (1958); Comment, 21 LA. L. REV. 783 (1961). But cf. Sobel v. National Fruit Prod. Co., 213 F. Supp. 564 (E.D. Pa. 1962).

⁸⁶ 28 U.S.C. § 1445(c) (1958).

⁸⁷ See Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 350-52 (1961); MOORE ¶ 0.167[6].

⁸⁸ Pub. L. No. 88-439 of Aug. 14, 1964, 78 Stat. 445, amending 28 U.S.C. § 1332(c) (1958). See notes 185, 196-98 and accompanying text *infra*.

pany may now conceivably have three citizenships: its state of incorporation, the state where it has its principal place of business, and the state of which its insured is a citizen in a direct action in which the insured is not joined.

These changes are relatively mild restrictions in the light of the various proposals that have been made and are still being made to curtail diversity jurisdiction.⁸⁹ Thus the future of diversity jurisdiction, like its past, would appear to be controversial.

III. FUTURE

A. Justification for Diversity Jurisdiction

A prerequisite to exploring the possible future uses of diversity jurisdiction is to determine whether it has a future at all. That is, on what basis, if at all, is the continuation of the jurisdiction justified? The answer to this question should also determine the extent and direction of its growth.

The Constitution of the United States was not intended to be a *utopian* plan for the operation of government. Rather it represents a pragmatic attempt to solve particular problems which had arisen under the Articles of Confederation.⁹⁰ The constitutional framers, of course, did draw upon political theory and structures of government past and present,⁹¹ and the blueprint for government which emerged from this combination of practical and theoretical con-

⁸⁹ *E.g.*, H.R. 1987, 82d Cong., 2d Sess. (1951); H.R. 1834, H.R. 1997, 88th Cong., 1st Sess. (1963) (would make a corporation a citizen of any state in which it is licensed to do business or is doing business); H.R. 2516, 85th Cong., 1st Sess. (1957) (would raise the jurisdictional amount to \$10,000 and eliminate corporations from the diversity jurisdiction provisions); H.R. 5344, 87th Cong., 1st Sess. (1961) (deny jurisdiction of suits by fiduciary representatives who have been appointed in order to create diversity where it would not have existed if the beneficiary or deceased had sued in his own name); see references to several other recent bills of 1951, 1952, and 1955 in S. REP. NO. 1830, 85th Cong., 2d Sess., 2 U.S. CODE CONG. & AD. NEWS 3099, 3114-15, 3134 (1958). For some relatively recent suggestions of law review commentators, see *e.g.*, Doub, *supra* note 54, at 278, 282-83 (favors abolition except where actual local prejudice can be shown, but at least should curtail corporate usage); Meador, *A New Approach to Limiting Diversity Jurisdiction*, 46 A.B.A.J. 383 (1960) (would tentatively eliminate personal injury suits based on state law); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 235-40 (1948) (would abolish general diversity grant and allow for specific statutes to cover demonstrated needs, but at least would favor making a corporation a citizen of every state in which it does business and encourage federal court abstention whenever the state law to be applied is uncertain). See also ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft No. 2, 1964).

⁹⁰ See FARRAND, THE FRAMING OF THE CONSTITUTION 201-10 (1913); FRANKFURTER & LANDIS, *op. cit. supra* note 47, at 6. The federal jurisdiction is dependent on practical needs and political compromises, not on tradition, inherent reasons or moral principles. Frankfurter, *supra* note 54, at 506, 514; see MOORE § 0.6[1].

⁹¹ See, *e.g.*, Documents at 212-13, 215-23, 237-38, 267-73, 288-89 (Madison's notes of speeches of Wilson, Hamilton, Pinckney, and Martin), 774, 783-85, 804-05, 814-21 (Yates' notes of speeches by Wilson, Madison, Pinckney, and Martin); THE FEDERALIST at iv-vii (Colonial ed. 1901) (introduction). See also the sketches of the members' backgrounds. Documents at 96-108 (by W. Pierce); FARRAND, *op. cit. supra* note 90, at 14-41; Murphy, *State Sovereignty and the Founding Fathers* (pts. 1-3), 30 MISS. L.J. 135, 261, 31 MISS. L.J. 50 (1959).

siderations, with few basic changes, has proven quite adaptable to the societal changes of almost two centuries.⁹² Consequently, initial motivations for including certain provisions in the Constitution are at least entitled to presumptive validity. Accordingly, we will first examine the original reasons used to justify diversity jurisdiction and inquire as to their current utility, and then in a subsequent section we will consider possible future uses and justifications for the jurisdiction.

The traditional view is that diversity jurisdiction was established to provide a forum for the determination of controversies between citizens of different states which would be free from local prejudice or influence.⁹³ While actual instances of state court prejudice against out-of-state citizens may have been difficult to prove,⁹⁴ "It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become embedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim."⁹⁵

It is probably more accurate to state that it was the fear of local prejudice—not the actual exercise of prejudice—that the constitutional fathers sought to guard against.⁹⁶ Chief Justice Marshall aptly commented that:

⁹² This, of course, had been accomplished with the aid of ingenious interpretation by the courts and political leaders. See FARRAND, *op. cit. supra* note 90, at 210. But see CROSSKEY, *POLITICS AND THE CONSTITUTION* (1953) for the view that misinterpretation has prevented the Constitution from operating as well as it should. See also MOORE § 0.1.

⁹³ See, e.g., *Burgess v. Seligman*, 107 U.S. 20, 34 (1882); *Lankford v. Platte Iron Works Co.*, 235 U.S. 461, 478 (1915) (dissenting opinion) (and the cases there cited); *Detres v. Lions Bldg. Corp.*, 234 F.2d 596, 597 (7th Cir. 1956); *Burt v. Isthmus Dev. Co.*, 218 F.2d 353, 356 (5th Cir. 1955); *Browne v. Hartford Fire Ins. Co.*, 168 F. Supp. 796, 797 (E.D. Ill. 1959); *Commercial Solvents Corp. v. Jasspon*, 92 F. Supp. 20, 25 (S.D.N.Y. 1950); *THE FEDERALIST* No. 80, at 440-41, 448 (Colonial ed. 1901) (Hamilton); *S. REP. NO. 1830, 85th Cong., 2d Sess.*, 2 U.S. CODE CONG. & AD. NEWS 3099, 3102, 3104 (1958); Phillips & Christenson, *The Historical and Legal Background of the Diversity Jurisdiction*, 46 A.B.A.J. 959, 963 (1960) (fear of local prejudice was only one of several reasons); M. Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 935-36 (1962); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923). See also *Scott v. Sanford*, 60 U.S. (19 How.) 393, 579-80 (1857) (Curtiss, J., dissenting).

⁹⁴ Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 493-95 (1928), maintains that the reported state decisions do not indicate such prejudice. Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 876 n.13 (1931), rejects the conclusion that there was no state prejudice as "presumptively improbable"; see Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 923-26 (1948).

⁹⁵ *Burford v. Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting).

⁹⁶ See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 354 (1856):

It is to make the people think and feel, though residing in different States of the Union, that their relations to each other were protected by the strictest justice, administered in courts independent of all local control or connection with the subject-matter of the controversy between the parties to a suit.

See also Frank, *supra* note 94, at 22-23; Marbury, *Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A.J. 379 (1960). Mr. Justice Story noted that state court judges with inadequate tenure could not be expected to be completely impartial in cases against their state's interests, and even if they did act fairly, "still the mischiefs would be most serious if the public opinion did not indulge such a belief. Justice, in cases of

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.⁹⁷

While local prejudices and state jealousies may be diminishing, it is a fair inference that some litigants still resort to the federal courts because of apprehensions as to the kind of justice that they will receive in the courts of the state of which their adversary is a citizen.⁹⁸ If such fears are not entirely justified by experience, it may be in part due to the existence of the alternate jurisdiction in the federal courts.⁹⁹

Several commentators have maintained that the constitutional framers were most interested in assuaging the apprehensions of commercial investors.¹⁰⁰ During the existence of the Confederation, a few state legislatures had passed debtor relief measures which prevented creditors from collecting the value of their loans and other investments.¹⁰¹ According to this theory,

these sort, should not only be above reproach, but above all suspicion." 2 STORY, COMMENTARIES ON THE CONSTITUTION 493 (5th ed. Bigelow 1891). Compare the remarks of Mr. Justice Frankfurter concurring in *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954):

The power of Congress to confer such jurisdiction was based on the desire of the Framers to assure out-of-state litigants courts free from susceptibility to potential local bias. That the supposed justification for this fear was not rooted in weighty experience is attested by the fact that so ardent a nationalist as Marshall gave that proposal of the Philadelphia Convention only tepid support in the Virginia Convention. 3 ELLIOT'S DEBATES 556 (1891). But in any event, whatever "fears and apprehensions" were entertained by the Framers and ratifiers, there was fear that parochial prejudice by the citizens of one State toward those of another, as well as toward aliens, would lead to unjust treatment of citizens of other States and foreign countries.

⁹⁷ *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

⁹⁸ See S. REP. NO. 1830, 85th Cong., 2d Sess., 2 U.S. CODE CONG. & AD. NEWS 3099, 3114, 3116-17 (1958); Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A.B.A.J. 71, 76 (1933); Comment, 31 MICH. L. REV. 59, 60-61 (1932). But see M. Summers, *supra* note 93, at 937-40.

⁹⁹ See 2 STORY, *op. cit. supra* note 96, at 492-93, 494; Phillips & Christenson, *supra* note 93, at 964.

¹⁰⁰ FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 8-9 (1928); WRIGHT, *FEDERAL COURTS* 68-69 (1963); Frank, *supra* note 94, at 11-12, 14-15, 26-28; Friendly, *supra* note 94, at 495-99; Warren, *supra* note 93, at 82; Yntema & Jaffin, *supra* note 94, at 878 n.13. See argument of Webster in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 237 (1827):

The Constitution was intended to accomplish a great political object. Its design was not so much to prevent injustice or injury in one case, or in successive single cases, as it was to make general salutary provisions, which, in their operation, should give security to all contracts, stability to credit, uniformity among all the states, in those things which materially concerned the foreign commerce of the country, and their own credit, trade and intercourse among themselves.

See also Mr. Chief Justice Marshall's dissenting opinion at 354-55. The asserted emphasis on the intention to protect the property class is questioned in HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 893 (1953).

¹⁰¹ See 2 STORY, *op. cit. supra* note 96, at 492.

it was in order to encourage the investment of much-needed foreign capital and to protect the investments of American creditors (many of whom sat in the Constitutional Convention), that tribunals were established which would be free from the influence of state legislatures.¹⁰² Whether or not fully anticipated by the Founders, this fostering of investment in the emergent nation was one of the most salutary effects ascribed to diversity jurisdiction. As former President and Chief Justice Taft stated:

The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial and commercial progress.¹⁰³

Judge Parker said of diversity jurisdiction that:

No power exercised under the Constitution has, in my judgment, had greater influence in welding these United States into a single nation; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into the various parts of the Union; and nothing has been so potent in sustaining the public credit and the sanctity of private contracts.¹⁰⁴

This basis for diversity is especially persuasive in regard to corporate usage of the jurisdiction. It is even more true today than it was in the early days of the republic that corporations frequently serve as the source of, as well as the medium for, investment, and incorporated enterprises are more often than not parties to important commercial transactions. These corporations feel that they have need to use, and frequently do use, the federal courts when litigation becomes necessary.¹⁰⁵

¹⁰² See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270, 365-67 (1827); Frank, *supra* note 94, at 14-15; Frankfurter, *supra* note 54, at 520; Friendly, *supra* note 94, at 495-99; Marbury, *supra* note 96, at 380.

¹⁰³ Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A.J. 601, 604 (1922).

¹⁰⁴ Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A.J. 433, 437 (1932). But see Frankfurter, *supra* note 54, at 521-22; Warren, *supra* note 54, at 684-85 (maintaining that the bias of southern and western courts has not been proved and that the presence of local investors in those areas insure against it). Yntema & Jaffin, *supra* note 94, at 878-79, 880 n.20, take issue with this view, noting that the highest percentage of diversity cases were, at that time, being filed in the South and West and that those were also the areas where most of the political opposition to diversity was coming from. See also 2 STORY, *op. cit. supra* note 96, at 492-94.

¹⁰⁵ See Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 10 (1963); Marbury, *supra* note 96, at 381. Prior to the 1958 amendment, 28 U.S.C. § 1332 (1958), corporations were parties to about 62% of all diversity cases being filed in the federal courts, and nonresident corporations doing business in the state of suit were parties to about 58% of all the diversity cases. S. REP. NO. 1830, 85th Cong., 2d Sess., 2 U.S. CODE CONG. & AD. NEWS 3099, 3111 (1958). In fiscal year 1962, corporations doing business in the state of suit were plaintiffs in 14.3% and defendants in 30.9% of original diversity actions and defendants in about 55% of the removed diversity cases. See ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 118-19 (Tent. Draft No. 1, 1963).

Protection against the possibility of discriminatory treatment of the non-resident by local courts was also deemed necessary to preserve domestic tranquility in the new Union.¹⁰⁶ Prior to the adoption of the Constitution there had been actual hostilities between certain states,¹⁰⁷ and, as previously observed, the proceedings of the Constitutional Convention support the inference that diversity and alienage jurisdiction were thought to be included in the general jurisdictional principle of "questions as may involve the national peace and harmony."¹⁰⁸ Moreover, Alexander Hamilton contended in the *Federalist* papers that:

The peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members; . . . As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which citizens of other countries are concerned. This is not less essential to the preservation of the public faith than to the security of the public tranquillity

The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is, perhaps, not less essential to the peace of the Union than that which has just been examined.¹⁰⁹

It has also been suggested that since the states were not alien to each other and a system of diplomatic relations and accompanying protections would be inappropriate, diversity jurisdiction was intended as a substitute protection when difficulties arose out of the relations of citizens of different states.¹¹⁰ The extent to which diversity jurisdiction has actually aided the tranquil relations between states cannot be accurately determined, but this is a vast country with many divergent interests and populated by a restless people reflecting many different races, creeds, and aspirations. There seems little doubt that the independent national judiciary exercising jurisdiction over controversies between citizens of different states has been a cohesive force, during both quiet and tumultuous times, holding this Nation together under the abiding principle of justice under law.¹¹¹

¹⁰⁶ 1 CROSSKEY, *op. cit. supra* note 92, at 645-46 (1953); Phillips & Christenson, *supra* note 93, at 960-62; see 2 STORY, *op. cit. supra* note 96, at 492. This was especially true in regard to aliens. Warren, *supra* note 93, at 82 n.78; Argument of Binney in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 67 (1809).

¹⁰⁷ See HART & WECHSLER, *op. cit. supra* note 100, at 10 n.17.

¹⁰⁸ See note 10 *supra* and accompanying text; Phillips & Christenson, *supra* note 93, at 960-62.

¹⁰⁹ THE FEDERALIST No. 80, at 438-40 (Colonial ed. 1901) (Hamilton); see 2 STORY, *op. cit. supra* note 96, at 497-98.

¹¹⁰ See S. REP. NO. 1830, 85th Cong., 2d Sess., 2 CODE CONG. & AD. NEWS 3099, 3114, 3116 (1958).

¹¹¹ See 2 STORY, *op. cit. supra* note 96, at 492-94; Parker, *supra* note 104, at 437.

Citizens of different states are also citizens of the United States, and they ought to be able to litigate their controversies in a tribunal of the sovereign to which they both belong.¹¹² The privileges and immunities clause of the Constitution¹¹³ embodied the basic principle that the new Union was established by the people of the United States and the government was one of individuals not of independent and corporate states as had been unsuccessfully attempted under the Articles of Confederation.¹¹⁴ Hamilton asserted that in order to maintain

that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union will never be likely to feel any bias inauspicious to the principles on which it is founded.¹¹⁵

An independent national judiciary was needed at the beginning and the need continues, and, in our opinion, not merely as an expounder of national laws. Until 1875 the bulk of the federal trial courts' civil jurisdiction involved diversity and that jurisdiction still accounts for a large percentage of private cases that are begun in or removed to the district courts.¹¹⁶ Cases in which

¹¹² S. REP. NO. 1830, 85th Cong., 2d Sess., 2 CODE CONG. & AD. NEWS 3099, 3114, 3116 (1958); THE FEDERALIST NO. 80, *op. cit. supra* note 109, at 440-41; Parker, *supra* note 104, at 438; see *Burt v. Isthmus Dev. Co.*, 218 F.2d 353, 356 (5th Cir. 1955).

¹¹³ U.S. CONST. art. IV, § 2. See also U.S. CONST. amend. XIV, § 1.

¹¹⁴ See HART & WECHSLER, *op. cit. supra* note 100, at 7; HUGHES, THE SUPREME COURT OF THE UNITED STATES 1, 9 (1928); Murphy, *State Sovereignty and the Drafting of the Constitution* (pts. 1 & 3), 31 MISS. L.J. 203, 208-12 (1960), 32 MISS. L.J. 155, 156 (1961); Yntema & Jaffin, *supra* note 94, at 871 n.2. See also Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 GEO. L.J. 1, 39-40 (1963).

¹¹⁵ THE FEDERALIST NO. 80, *op. cit. supra* note 109, at 440-41; accord, 2 STORY, *op. cit. supra* note 96, at 492; Phillips & Christenson, *supra* note 93, at 959, 962. It has been contended that the right to sue in the federal courts on grounds of diversity of citizenship is one of the privileges of a citizen of the United States. See Scott v. Sanford, 60 U.S. (19 How.) 393, 403 (1857); Yntema & Jaffin, *supra* note 94, at 878 n.13. See also HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 182-83 (1918).

¹¹⁶ See S. REP. NO. 1830, 85th Cong., 2d Sess., 2 U.S. CODE CONG. & AD. NEWS 3099, 3109-10 (1958); AD. OFFICE OF U.S. CTS. ANN. REP. 76, 230-33 (1960); Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A.B.A.J. 499 (1933); Frank, *supra* note 94, at 16-17; Yntema, *supra* note 98; Note, 48 IOWA L. REV. 410, 417-18 (1963). During the fiscal year ending June 29, 1958, diversity cases accounted for over 41% of the total cases filed in all of the district courts. AD. OFFICE OF U.S. CTS. ANN. REP. 80 (1959). Since the passage of the restrictive amendment in 1958, 28 U.S.C. § 1332 (1958), the percentage of diversity cases has fallen to about 30% of the total cases filed. AD. OFFICE OF U.S. CTS. ANN. REP. 80 (1959); AD. OFFICE OF U.S. CTS. ANN. REP. 196 (1962). See also MOORE ¶0.77[1]. The large number of diversity cases brought to the federal courts and their apparently satisfactory disposition is itself evidence of the value of diversity jurisdiction. See Frank, *supra* note 105, at 10.

citizens of different states or aliens were parties provided a substantial opportunity for the federal courts to achieve uniformity in those fields in which it was deemed desirable, such as commercial, conflicts, maritime, and international law. ¹¹⁷ *Swift v. Tyson* ¹¹⁸ enabled the federal courts to expound and develop unifying common law principles for this large and diverse country. Paradoxically, its principle, never fully accepted,¹¹⁹ had largely spent itself, and its demise at the hands of *Erie R.R. v. Tompkins*¹²⁰ was in order. But the latter case can give a fresh force and meaning to diversity jurisdiction. The dimensions of the *Erie* doctrine are not yet settled,¹²¹ and the district courts sitting as "another court of the state"¹²² can contribute to the development of uniformity in the law especially when determining unsettled questions under state adopted "uniform acts." Moreover, in a growing number of areas a federal interest and a need for uniformity may override the justification for applying state law, even in a diversity case, and a federal common law is in the process of development.¹²³ Hopefully it may also come to pass that the need for national rules of conflict of laws will be recognized by the Supreme Court or Congress¹²⁴ and diversity cases will then provide the primary means for the federal courts to expound such rules.

It has been contended that at least some of the purposes underlying the grant of diversity jurisdiction could have been accomplished through appellate

¹¹⁷ See Argument of Harper in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 83 (1809); CROSSKEY, *op. cit. supra* note 92, at 566-77, 645-62; *cf.* THE FEDERALIST No. 22, at 117 (Colonial ed. 1901) (Hamilton); 2 STORY, *op. cit. supra* note 96, at 498; 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 717-18; 2 *id.* at 88-89, 3 *id.* at 698-99 (1928); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 419-21 (1964); F. Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202, 207 (1946); Parker, *supra* note 104, at 483; Yntema, *supra* note 98, at 74-76. *But see* Campbell, *Is Swift vs. Tyson An Argument For Or Against Abolishing Diversity of Citizenship Jurisdiction?*, 18 A.B.A.J. 809 (1932).

¹¹⁸ 41 U.S. (16 Pet.) 1 (1842); see MOORE ¶¶ 0.302-0.303.

¹¹⁹ See CROSSKEY, *op. cit. supra* note 92, at 647-62, 912-16; *cf.* Friendly, *supra* note 117, at 405-06.

¹²⁰ 304 U.S. 64 (1938); see MOORE ¶ 0.304.

¹²¹ See MOORE ¶¶ 0.306, 0.312-0.319, 0.328; WRIGHT, FEDERAL COURTS §§ 55-56, 59-60 (1963); Friendly, *supra* note 117, at 403. *Compare* Guaranty Trust Co. v. York, 326 U.S. 99 (1945), with *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958).

¹²² *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945); see Hart, THE RELATIONS BETWEEN STATE AND FEDERAL LAW, 54 COLUM. L. REV. 489, 510 (1954). See also MOORE §§ 0.307-0.309; WRIGHT, FEDERAL COURTS § 58 (1963); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946); Corbin, *The Laws of the Several States*, 50 YALE L.J. 762 (1941); Friendly, *supra* note 117, at 400-01.

¹²³ See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640 (9th Cir. 1961); *cf.* Note, 77 HARV. L. REV. 1084 (1964). See also MOORE ¶¶ 0.318-0.328; Friendly, *supra* note 117, at 405, 407-22.

¹²⁴ See WRIGHT, FEDERAL COURTS § 57 (1963); ALI, *op. cit. supra* note 105, at 28-29, 98-101, 114-16, 142-49, 154-214; Baxter, *Choice of Law & the Federal System*, 16 STAN. L. REV. 1 (1963); Cook, *The Federal Courts & the Conflict of Laws*, 36 ILL. L. REV. 493 (1942); *cf.* Friendly, *supra* note 117, at 401-02.

jurisdiction alone. However, the early proponents of diversity successfully argued that appeals would become too numerous, would cause excessive expense and inconvenience, and, in any event, would not adequately protect against the apprehended evils that might be encountered in the state courts.¹²⁵ The wisdom of this foresight has certainly been verified by experience. The presence of local influence is rarely sufficiently apparent to be made the basis of an appeal;¹²⁶ after-the-fact review does little to comfort the apprehensions of potential litigants who may be dissuaded from entering into needed investments or interstate transactions; and corporations, although citizens for purposes of diversity jurisdiction and frequent litigants, are not considered as citizens entitled to the protection of the privileges and immunities clause.¹²⁷ In any event, whether the desire is for domestic tranquillity, uniformity of law or procedure, or freedom from bias, a single Supreme Court for a nation which stretches across a continent and beyond and which already has an overloaded docket¹²⁸ can hardly be considered an adequate or convenient means of accomplishing the objective. The large number of diversity cases filed in and removed to the federal district courts is itself evidence of the desirability and need for the jurisdiction.¹²⁹

There is still another basis for diversity which cannot be accomplished through appellate jurisdiction. It has to do with the quality of justice available in the federal courts. It is perhaps the most "common-sense" contemporary justification for the jurisdiction and it is one with ample historical antecedents.

¹²⁵ *Documents* at 157-59, 405 (Madison's notes), 849 (King's notes).

Madison observed that unless inferior tribunals were dispersed throughout the Republic with final jurisdiction in many cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the Supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body, without arms or legs to act or move.

Documents at 158. "King remarked as to the comparative expense that the establishment of inferior tribunals [would] cost infinitely less than the appeals that would be prevented by them." *Documents* at 159. See FARRAND, *THE FRAMING OF THE CONSTITUTION* 79-80 (1913); *THE FEDERALIST* No. 81, at 448-49 (Colonial ed. 1901) (Hamilton); Friendly, *supra* note 94, at 501-02; Warren, *supra* note 93, at 123-25.

¹²⁶ See note 95 *supra*; MOORE § 0.6[1]; Yntema, *supra* note 98, at 120.

¹²⁷ *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907) (fourteenth amendment); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868) (article IV, § 2); see Yntema & Jaffin, *supra* note 94, at 870 n.1.

¹²⁸ See Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959); Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold, The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 83-86 (1960); *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 81-85 (1963). But see Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

¹²⁹ See Frank, *supra* note 105, at 10; notes 105 & 116 *supra*.

At the time of the adoption of the Constitution the administration of justice in the state courts was somewhat unpredictable. Many courts were controlled or under the influence of state legislatures, judicial tenure was often short or terminable at the will of the legislature or executive, and the judges were sometimes lacking in experience and ability.¹³⁰ Federal justice, however, was to be administered by judges with secure tenure and salary who retained their common-law powers to comment on the evidence and control the course of trial, and by more broadly-based juries determining by a unanimous verdict those questions which were historically within its province.¹³¹ Once again the federal courts have become the leaders in procedural reform, adopting and expounding modern rules of procedure designed "to secure the just, speedy, and inexpensive determination of every action."¹³² And procedural reform is not ended. Rules for admiralty and bankruptcy, as well as criminal and civil rules, are being consolidated, simplified, and improved with experience,¹³³ and under federal leadership, a modernization of the law of evidence through uniform rules of court is being launched.¹³⁴

Today, many states have modernized their procedures along federal lines, and the independence, integrity, and ability of most state judges is generally acknowledged. Nevertheless, some states have not come as far as others, and only in the federal courts is an out-of-state litigant always afforded the best available pleading practices and pre-trial and trial procedures, a judge free of the pressures of re-election or reappointment, and a jury without parochial attachment to a single county or municipality. A diversity case is important by virtue of the minimum monetary amount alone, now in excess of 10,000 dollars, and only in a federal court can a litigant feel secure that his case will be determined on its merits and not on some procedural technicality or according to a "game" or "sporting" theory of justice.

¹³⁰ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); *Documents* at 153-54, 401; HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 3-4, 12 (1928); 2 STORY, *op. cit. supra* note 96, 408-09; Doub, *Time for Re-Evaluation: Shall We Curtail Diversity Jurisdiction?*, 44 A.B.A.J. 243-44 (1958); Frank, *supra* note 94, at 27-28; Friendly, *supra* note 94, at 497-98.

¹³¹ U.S. CONST. art. III, amend. VII; *Documents* at 154-55, 403-04, 429-32, 623-24; THE FEDERALIST NOS. 78 & 79 (Hamilton); Phillips & Christenson, *supra* note 93, at 962-63; see Parker, *supra* note 104, at 437-38. But see Warren, *supra* note 104, at 686, stating that there was no difference in the procedures of the federal and state courts in the early years.

¹³² FED. R. CIV. P. 1; see MOORE ¶ 1.13.

¹³³ See MOORE, *FEDERAL PRACTICE AND OFFICIAL FORMS* §§ 15-20, 31, 32 (1963); Judicial Conference, *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 34 F.R.D. 325 (1964); Judicial Conference, *Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts*, 34 F.R.D. 411 (1964); Wright, *Proposed Changes in Federal Civil, Criminal, and Appellate Procedure*, 35 F.R.D. 317 (1964).

¹³⁴ Judicial Conference, *A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts*, 30 F.R.D. 73 (1962); MOORE ¶ 43.02[5]; MOORE, *op. cit. supra* note 133, § 22, at 200-01 (1963).

This is not to belittle the role of the state courts. Our finest judicial hours are those when both federal and state courts work as harmonious partners in the exercise of a concurrent jurisdiction embracing both federal and state rights. Diversity jurisdiction enables the federal courts to join in the enforcement of nonfederal rights just as the state courts are partners with the federal courts in the application of a multitude of federal rights.¹³⁵ Diversity jurisdiction brings the district courts to the lawyers and the people everywhere; and by introducing state lawyers—many of whom would not otherwise practice in the federal courts—to the modern federal practice, it has done more to encourage and promote state procedural reform than any other single factor.¹³⁶ Moreover, the elimination of diversity jurisdiction would end or substantially curtail the interaction between federal and state courts which has so greatly aided procedural and substantive law reform in both systems.¹³⁷ The abolition of diversity jurisdiction would also remove the mainstream of tort and contract litigation from the federal system, and, as narrowly specialized tribunals, the federal courts might suffer a depreciation in the quality of lawyers who would accept federal judicial appointments and in the broadness of the perspective which the judges would bring to their task.¹³⁸

While the present superiority of federal courts may be difficult to prove and perhaps "hardly politic to advance,"¹³⁹ and while many state courts are of high caliber, it is nevertheless generally acknowledged that the federal courts and federal judiciary in general enjoy a merited excellent reputation, and many attorneys have invoked diversity jurisdiction on behalf of their clients because of a preference for the procedures and judicial administration available in the federal courts.¹⁴⁰ Consequently it would seem somewhat foolish and wasteful to dispose of a jurisdiction which is provided for in the national

¹³⁵ See MOORE §§ 0.6[1], 0.6[3]-0.6[5], 0.201.

¹³⁶ See Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 TEXAS L. REV. 211, 214-17 (1961); Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 156-60 (1948); Clay, *May the Federal Civil Rules Be Successfully Adopted to Improve State Procedure? The Kentucky Experience*, 24 F.R.D. 437 (1960); Wright, *Procedural Reform in the States*, 24 F.R.D. 85 (1960). But see the arguments of Mr. Justice Frankfurter that diversity jurisdiction enables influential litigants to avoid the state courts and withdraws the incentive for state court reform. *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 60 (1954) (concurring opinion); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 522 (1928). See also MOORE § 0.504.

¹³⁷ See Frank, *supra* note 105, at 11-12.

¹³⁸ See Phillips & Christenson, *supra* note 93, at 965; Marbury, *supra* note 96, at 381.

¹³⁹ WRIGHT, *FEDERAL COURTS* 68 (1963).

¹⁴⁰ A recent survey of diversity cases filed in or removed to the federal courts in Wisconsin showed that 68 of the 164, or 41.2%, of the reasons given by attorneys for choosing the federal forum related to the superior procedures or personnel expected to be available in the federal court. M. Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 937-38 (1962) (the author concludes that such "tactical" reasons are inadequate to support continuation of diversity jurisdiction). See S. REP. NO. 1830, 85th Cong., 2d Sess., 2 U.S. CODE CONG. & AD. NEWS 3099, 3114, 3116-118 (1958); Frank, *supra* note 105, at 10-11.

Constitution and which is admittedly working well in order to accomplish a conceptual neatness (state law in state courts and federal law in federal courts) which would expose litigants to an uncertain fate in the state courts and perhaps curtail the effectiveness of the federal courts.

A special committee of the American Law Institute recently undertook a study of the appropriate bases for the jurisdiction of the federal and state courts in light of modern conditions. In their tentative draft the study group contends that while they are not in favor of abolishing diversity jurisdiction, about fifty percent of the diversity cases have no valid justification for being litigated in the federal courts.¹⁴¹ Their guiding principle is that the function of diversity jurisdiction is:

to assure a high level of justice to the traveler or visitor from another State; when a person's involvement with a State is such as to eliminate any real risk of prejudice against him as a stranger and to make it unreasonable to heed any objection he might make to the quality of its judicial system, he should not be permitted to choose a federal forum, but should be required to litigate in the courts of the State.

In accordance with this principle the most far-reaching proposal is to bar a plaintiff from the federal court in his home State . . .

On the same basis, a corporation with a permanent "local establishment" in a State would be prohibited from invoking the jurisdiction, either originally or on removal, of a federal court in that State in any action related to the activities of that establishment.¹⁴²

We cannot accept these proposals to so drastically curtail diversity because, as previously observed, the function of the jurisdiction is much broader than that endorsed by the ALI study group. The Reporters did indeed consider several of the rationales for diversity which have been suggested here but the key to our basic disagreement is revealed by their contention that at least one of these bases does not justify "taking away from the State courts cases arising under State law which are properly the business of the States."¹⁴³ However, if these cases are between citizens of different states, they are as much the business of the federal government as they are of the states. The Constitution provides that the federal judicial power shall extend to controversies of two general categories.¹⁴⁴ In one the federal element is to be found in the nature of the subject matter: cases arising under the Constitution, laws and treaties of the

¹⁴¹ ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 1-2, 4-5, 168-72 (Tent. Draft No. 2, 1964).

¹⁴² *Id.* at 2.

¹⁴³ *Id.* at 50. See also *id.* at 160-61.

¹⁴⁴ U.S. CONST. art. III, § 2. In a relatively obsolete jurisdiction, that of controversies between citizens of the same state claiming lands under grants of different states, the federal element is in the source of the title to the property. See 28 U.S.C. § 1354 (1958).

United States, and admiralty and maritime cases. In the other the matter justifying national concern is the nature of the parties to the controversy whether it arises under state, federal or international law. This category includes cases affecting ambassadors, public ministers and consuls, controversies to which the United States shall be a party, controversies between two or more states or between a state and citizens of another state or foreign country, as well as controversies between citizens of different states or a citizen of a state and an alien. Thus, under the particular federal system adopted in our Constitution, diversity cases are as much the business of the federal courts as are federal question cases. Of course, Congress has been recognized as possessing the power to vest less than all of the article III power in the federal courts,¹⁴⁵ and changing conditions may justify changing the scope of the courts' jurisdiction, but the point being made is that diversity jurisdiction is an affirmative part of the constitutional federal jurisdiction and is not an exceptional grant justified only by the perhaps temporary hostilities and lack of mobility existing between states in 1789. Accordingly, it is erroneous to assert, as the ALI Reporters do, that "access to the federal courts because of the diversity of citizenship of the parties should be permitted only upon a showing of strong reasons therefor and only to the extent that these reasons justify."¹⁴⁶ The proper presumption, in our view, is that the inclusion of diversity cases in article III, the vesting of such jurisdiction in the federal courts by the First Congress, the continuation of the jurisdiction, substantially unimpaired, for the life of the Republic, and the frequent invocation of the jurisdiction with a fair record of accomplishing justice between litigants clearly casts the burden of proof on those who seek to abolish or curtail diversity rather than on those who seek to defend or maintain it.¹⁴⁷ Diversity cases do possess a federal element: the controversy is between citizens from more than one state and there is no tribunal outside of the federal system to which all parties to the controversy can claim allegiance.¹⁴⁸ And this element is presented whether it is the out-of-state party or local resident who invokes the federal court's jurisdiction.

The Constitution envisions a working partnership between the state and federal courts under which each forum may enforce the law of the other sovereign whenever it is deemed appropriate. If delay in the federal courts has

¹⁴⁵ See *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922), 24 A.L.R. 1084 (1923); MOORE, ¶¶ 0.7[1], 38.08[1].

¹⁴⁶ ALI, *op. cit.* *supra* note 141, at 49.

¹⁴⁷ EHRENZWEIG & LOISELL, JURISDICTION IN A NUTSHELL 153 (1964); see Frank, *supra* note 105; Marbury, *supra* note 96.

¹⁴⁸ See S. REP. NO. 1830, 85th Cong., 2d Sess., 2 U.S. CODE CONG. & AD. NEWS 3099, 3114, 3116 (1958); THE FEDERALIST NO. 80, at 440-41 (Colonial ed. 1901) (Hamilton); Parker, *supra* note 104, at 438; cf. Frank, *supra* note 105, at 12.

become excessive, as it no doubt has in some areas, remedies should be sought which strike at the cause of the delay and which do more than merely relocate the problem into the state courts. Such remedies include greater improvement in pre-trial and trial procedures based upon experiences under the existing federal rules, as well as an increase in the number of federal courts and judges. In this latter regard, it is the expressed view of one distinguished jurist, Mr. Justice Frankfurter, that an enlargement of the judicial plant and a steady increase in judges is bound to depreciate the quality of the federal judiciary.¹⁴⁹ We cannot agree. While mere enlargement is not the solution, wise and discriminating enlargement must be accomplished to keep pace with an expanding nation. America of 1964 is wholly unlike America of 1789. If it be a fact, which we doubt, that the federal judiciary of 1789 was like an exquisite jewel box that could accommodate only a few precious jewels, the jewel box cannot be our present goal. Philosophical jurists can continue to ride in search of such a myth, but we must be concerned with the mundane problem of having an adequate judicial plant in 1964, 1984, and 2004 to handle the increasing litigation brought about by a scientific and social revolution and by an expanding population in a territory of constant dimensions where personal adjustments become more personal and government becomes more and more complex. By an adequate judicial plant, we mean enough judges, along with the necessary physical facilities and staff, to handle expeditiously all the proper judicial business brought before them. But a judge should have enough leisure time so that he may bring to each case at hand the art of judging; he should not be reduced to a factory robot clearing a certain number of statistics daily from his docket.

We need have no fear that competent judges cannot be found. The bar is better trained today, for example, than it was a generation ago. From coast to coast there are lawyers in great abundance who have the legal abilities and training to make good judges. Scarcity is not a problem. The problem, as it has always been, is to select from the available crop those men and women possessing integrity and the creative art of judging. While the method of selection of federal judges combined with the tradition which accompanies the wearing of the federal judicial robe has in general produced a strong and capable judiciary, the attention of the judicial reformers will be better spent on improving methods of judicial selection than on devising means of jurisdictional destruction.

We realize, of course, that federal dockets are crowded and that a beguiling approach to the problem is to lop off diversity jurisdiction. But if the

¹⁴⁹ *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 59 (1954) (concurring opinion).

prime goal is clean dockets, then we can more effectively accomplish it by abolishing all lower federal court jurisdiction. Such an approach is obviously fanciful. In a realistic examination of federal jurisdiction some grants will be found more important to a sound federalism than others. But no grant should be eliminated if it serves a useful purpose for the enforcement of federal rights, or for implementing the partnership of federal and state courts, or in enabling litigants to obtain justice under our federal system. This latter purpose cannot be over emphasized, for "law was made for man; not man for the law." Courts exist to serve suitors, and for them the best forum and the best remedy are none too good. The whittling away or surrender of diversity jurisdiction, or any other part of the federal jurisdiction which serves a legitimate function under the Constitution, only weakens the federal system under which we have long prospered and, with fair success, have done justice between disputants.

B. Projected Development of Diversity Jurisdiction

The following paragraphs are not predictions of things to come based upon the authors' crystal-ball gazing. Rather, they represent hoped-for developments based upon value judgments which we believe are consistent with the best interests of the citizens of the United States. Our general premise is that whenever citizens of different states are real parties in interest in a justiciable controversy, any of such parties should have an option to litigate the cause in the federal courts. We believe that such cases involve a federal element in light of the constitutional purposes of diversity jurisdiction and of federal court jurisdiction in general, and that contemporary values and conditions favor the encouragement rather than the curtailment of federal court usage in these cases.

Perhaps the most basic and far-reaching change which is needed is to replace the complete diversity doctrine of *Strawbridge v. Curtiss*¹⁵⁰ with a rule of minimal diversity. This would permit an action to be brought in or removed to the federal court as long as there was diversity of citizenship between one plaintiff and one defendant. The citizenship of other parties would be immaterial. In holding that every plaintiff must be of diverse citizenship from every defendant, the *Strawbridge* case merely construed the jurisdictional statute then in force and did not confine the constitutional grant of jurisdiction of "Controversies . . . between Citizens of different States" to the same narrow limits. In the opinion for the Court, Mr. Chief Justice Marshall first quoted the act of Congress limiting diversity jurisdiction to "where . . . the suit is between a citizen of a state where the suit is brought, and a citizen of another state." He then stated that: "The court understands these expres-

¹⁵⁰ 7 U.S. (3 Cranch) 267 (1806).

sions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts."¹⁵¹

There is nothing in the case to indicate that the Supreme Court intended to establish the constitutional limits of diversity jurisdiction. Certainly the language of the statute which speaks in terms of "suits" is distinguishable from the language of article III speaking in terms of "controversies."¹⁵² And while the *Strawbridge* doctrine of complete diversity is still applied to the current diversity statute which more closely approximates the constitutional language (although this statute too is limited to "civil actions"), it is reasonable to construe a constitutional provision more broadly than a statutory one of similar language. Thus, federal-question jurisdiction for appellate purposes has been held to be broader than that for original jurisdictional purposes although both the Constitution and the statute governing original jurisdiction speak generally of cases arising under the Constitution, laws, or treaties of the United States.¹⁵³ Constitutional provisions are meant to endure for ages while statutory provisions may have more limited purposes and are relatively easier to amend.¹⁵⁴ If the only basis for the grant of diversity jurisdiction were to protect an out-of-state citizen from local prejudice, a complete diversity rule may have been justified since the presence of a citizen of the same state on each side might minimize such prejudice. But, as previously explained, diversity jurisdiction has a much broader basis, and the mere presence of citizens of different states on opposing sides of the controversy is a sufficient federal element to justify invoking federal court jurisdiction.

Consequently, it is clear that Congress could, as indeed it has done in a few instances, legislate on the basis of a broader definition of diversity. For example, in a statutory interpleader action jurisdiction can be supported if any one of the adverse claimants is of diverse citizenship from any other claimant regardless of the citizenship of the other claimants or stakeholder.¹⁵⁵ Removal of an entire suit to a federal court where there is a removable claim joined with an otherwise nonremovable separate and independent claim, can also be constitutionally justified on the basis that less than complete diversity will support the jurisdiction of the federal courts.¹⁵⁶

¹⁵¹ *Ibid.*

¹⁵² See ALI, *op. cit. supra* note 141, at 177.

¹⁵³ Compare *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908), with *Louisville & N.R.R. v. Mottley*, 219 U.S. 467 (1911).

¹⁵⁴ See *United States v. Classic*, 313 U.S. 299, 316 (1941); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326-27 (1816); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 476 (1793); MOORE ¶ 0.60[2]; WRIGHT, FEDERAL COURTS 72 (1963).

¹⁵⁵ 28 U.S.C. § 1335 (1958); *Haynes v. Felder*, 239 F.2d 868 (5th Cir. 1957); see MOORE ¶ 22.09; WRIGHT, FEDERAL COURTS 280-81 (1963).

¹⁵⁶ 28 U.S.C. § 1441(c) (1958); see ALI, *op. cit. supra* note 141, at 178-81. See also MOORE ¶ 0.163[3].

It has been said that Marshall himself regretted having made the decision in *Strawbridge v. Curtiss*,¹⁵⁷ and, in any event, the doctrine of complete diversity has been an unnecessary obstruction to the full and most advantageous development of diversity jurisdiction. The fictional presumption of the citizenship of a corporation's stockholders¹⁵⁸ and strained uses of ancillary and pendent jurisdiction were resorted to in order to soften the complete diversity approach.¹⁵⁹ Without such devices most litigation involving corporations and unincorporated associations and many multi-party actions would be denied a federal forum on the basis of diversity jurisdiction. The adoption of a minimal diversity rule for all cases involving natural citizens would accomplish what we consider a desirable straight-forward expansion of diversity jurisdiction, would eliminate many of the troublesome problems of ancillary and pendent jurisdiction, and would make possible a new role and justification for the jurisdiction in multi-party suits.

Even the study group of the American Law Institute, which takes a much more restrictive view of the justification for diversity jurisdiction and in general recommends its substantial curtailment, recognizes the need to expand diversity by the adoption of a minimal diversity rule in cases where multiple parties necessary for a just adjudication of a controversy are not all amenable to process in any one state.¹⁶⁰ Under present conditions some plaintiffs are completely denied an opportunity to litigate their claims because there are two or more indispensable parties who cannot all be served with process in a single state,¹⁶¹ and in other cases two or more actions are necessary to adjudicate the rights and liabilities of parties when a single suit could have more efficiently disposed of all the claims if all the parties had been able to be joined in the suit. Partial recognition of these problems was given by the 1963 amendments to the Federal Rules of Civil Procedure. Rule 4 was amended to permit service of process beyond the territorial limits of a state, but within 100 miles of the court, in order to bring in additional parties who are indispensable or conditionally necessary under Rule 19, or parties to a counterclaim or cross-claim pursuant to Rule 13(h) or impleaded parties under Rule 14.¹⁶² This is only a small step in the right direction. In these days of fast,

¹⁵⁷ *Louisville C. & C.R.R. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844).

¹⁵⁸ See notes 34-38 *supra* and accompanying text; McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts* (pts. 1-2), 56 HARV. L. REV. 853, 867-70, 1090, 1103-118 (1943).

¹⁵⁹ See ALI, *op. cit. supra* note 141, at 180-82; MOORE ¶¶ 0.60[8.-4], 0.163[3], 0.504. See also MOORE ¶¶ 13.15, 13.19, 13.36, 14.25-27, 18.07, 24.18.

¹⁶⁰ See ALI, *op. cit. supra* note 141, at 35-36, 176-86.

¹⁶¹ See *id.* at 119-37; Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 483, 523-26 (1957).

¹⁶² See MOORE ¶¶ 4.01[22]-[23], 4.42; Chambliss, *Significant Changes in the Federal Rules Since 1960*, 31 TENN. L. REV. 317, 318, 321 (1964); Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963*, 77 HARV. L. REV. 601, 629-35 (1964).

efficient, and reliable means of communication, when travel from New York City to San Francisco is probably easier and less time consuming than travel was in 1789 from New York City to Buffalo, we should be ready to throw off 1789 concepts of service of process. At present only a federal court can constitutionally be vested with the power to serve process without regard to state boundaries. If nation-wide service of process can be provided at least in multi-party suits, as it is in interpleader actions,¹⁶³ and if the jurisdiction of the federal courts can be invoked on the basis of diversity of citizenship existing between any two adverse parties, the waste and injustice now possible in multi-party suits will be at an end. Such a new use for diversity jurisdiction would itself provide a contemporary justification for continuation of the jurisdiction.¹⁶⁴

As indicated, the complete diversity rule has also impeded the use of diversity jurisdiction by corporations and unincorporated associations. Although the Supreme Court held at an early date that a corporation was not a citizen, it recognized that the natural persons who composed the corporation could sue or be sued in the corporate name on the basis of their own citizenship.¹⁶⁵ But under the *Strawbridge* approach, diversity would be lacking whenever anyone of perhaps a very large number of stockholders was a citizen of the same state as the adverse party.¹⁶⁶ To avoid this harsh result and to permit suits by and against these corporate parties whose local influence and effect on interstate commerce was great, the Court resorted to a fictional presumption that all the members of the corporation were citizens of the state of incorporation.¹⁶⁷ The 1958 amendment to the diversity statute accomplished the same result by deeming a corporation to be a citizen of its state of incorporation and went a step further by deeming it also to be a citizen of the state where its principal place of business is located.¹⁶⁸ This amendment may be construed as a legislative modification of the *Strawbridge* doctrine in that diversity is no longer required between all of a corporation's members and the adverse party but only between such party and those members of the corporation who are natural citizens of the state in which the corporation is

¹⁶³ 28 U.S.C. § 2361 (1958); MOORE ¶ 22.13.

¹⁶⁴ See EHRENZWEIG & LOUISELL, JURISDICTION IN A NUTSHELL 151, 154 (1964); WRIGHT, FEDERAL COURTS 65, 72, 234-35 (1963); Kessler, *Corporations and the New Federal Diversity Statute: A Denial of Justice*, 1960 WASH. U.L.Q. 239, 247-51, 276 (1960); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 239-40 (1948).

¹⁶⁵ *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809); see notes 34-38 *supra* and accompanying text.

¹⁶⁶ *E.g.*, *Commercial & R.R. Bank v. Slocomb*, 39 U.S. (14 Pet.) 60 (1840); *Sullivan v. Fulton Steamboat Co.*, 19 U.S. (6 Wheat.) 450 (1821).

¹⁶⁷ *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314 (1853); see MOORE & WECKSTEIN, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1427-430, 1448-449 (1964).

¹⁶⁸ 28 U.S.C. § 1332(c) (1958); see notes 74-80 *supra* and accompanying text.

chartered and those members who are citizens of the state in which the corporation has its principal place of business. This approach assumes that corporations as such cannot be treated as citizens and that jurisdiction must still be based on the citizenship of its members. This assumption, however, is neither realistic nor necessary. Being a creature of the law, a corporation's qualities, characteristics, powers, and limitations depend upon what the law-makers provide. In other words, a corporation is and can do whatever the law, within rational limits, says it is and can do.¹⁶⁹ Thus a corporation has been held to be a "person" under the due process clause of the fifth amendment¹⁷⁰ but not a "person" under the self-incrimination clause of the same amendment.¹⁷¹ Similarly, "whether or not a corporation is a 'citizen', and if so, the method of determining its citizenship, depends upon the problem involved."¹⁷² That is, it is a question of interpretation of the statutory or constitutional provision being applied.¹⁷³ Thus, whether or not a corporation can be treated as a citizen within the meaning of article III should depend upon whether such treatment is consistent with the constitutional basis of diversity jurisdiction. Our position, elaborated elsewhere,¹⁷⁴ is that many of the reasons supporting the grant of diversity jurisdiction apply with particular force to the use of diversity by corporations.

The congressional choice to treat a corporation as a citizen of the state where it has its principal place of business is clearly a rational one. It corresponds to the place of domicile of a natural person and to the facts of business life¹⁷⁵ as well as to the local prejudice basis of diversity jurisdiction.¹⁷⁶

¹⁶⁹ See Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926); cf. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819); HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* 165-66 (1918).

¹⁷⁰ *United States v. McHie*, 194 Fed. 894 (N.D. Ill. 1912); see *The Sinking-Fund Cases*, 99 U.S. 700, 718-19 (1878).

¹⁷¹ *Wilson v. United States*, 221 U.S. 361, 377-84 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906).

¹⁷² HENN, *CORPORATIONS* 91 (1961). See also STEVENS, *PRIVATE CORPORATIONS* 56 (1949).

¹⁷³ See HENN, *CORPORATIONS* 90-91 (1961); STEVENS, *PRIVATE CORPORATIONS* 50-51, 56 (1949). See also note 14 *supra*.

¹⁷⁴ See Moore & Weckstein, *supra* note 167, at 1445-51.

¹⁷⁵ See 104 CONG. REC. 12686 (1958); HENDERSON, *op. cit. supra* note 169, at 190-93; Marbury, *Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A.J. 379, 381 (1960). For general venue purposes a corporation may be sued in and is regarded as a resident of any judicial district in which it is incorporated or licensed to do business or doing business. 28 U.S.C. § 1391(c) (1958). Under the law prior to the Judicial Code of 1948, a corporation was a resident, for purposes of venue, of the state in which it was incorporated, and where this state was divided into two or more districts, then of the district where its official residence was designated by the corporation's charter or state law, and in the absence of such designation, then in the district where the corporation's principal office was located. See MOORE ¶ 0.141[2-6]. And this law may still be applicable to determining the residence of a corporation suing as plaintiff. See MOORE ¶ 0.142[5-3].

¹⁷⁶ S. REP. NO. 1830, 85th Cong., 2d Sess., 2 U.S. CODE CONG. & AD. NEWS 3099, 3102 (1958); Note, 6 UTAH L. REV. 231, 237-38 (1958). But see Friedenthal, *New*

In addition, the Supreme Court has long accepted the validity of the analogous provision that national banks, for purposes of jurisdiction of most actions, shall "be deemed citizens of the States in which they are respectively located."¹⁷⁷ Continuing to treat a corporation also as a citizen of the state of incorporation, however, is less reasonable. The selection of the state of charter is frequently influenced by tax and other considerations having little to do with the organization and government of the corporation. Moreover, the normalcy of incorporation under general and liberal corporation laws of a similar nature in most all states¹⁷⁸ makes the happenstance of incorporation in a particular state of limited significance for purposes relevant to diversity of citizenship jurisdiction. Consequently, it may now be more rational to treat a corporation as a citizen only of the state where it has its principal place of business. While the determination of that state has proved to be troublesome in regard to corporations with wide-spread activities in two or more states,¹⁷⁹ judicial experience and analysis should eventually provide reliable guides to a solution. If, as we have suggested elsewhere,¹⁸⁰ the principal place of business is held to be in the state upon which the corporation most impinges and where most of its litigation arises, the increase in federal court jurisdiction will not be significant since most of that litigation will likely be with citizens of that same state. Furthermore, since the state of incorporation will no longer be material, difficult problems of determining the citizenship or citizenships of corporations chartered in more than one state will be eliminated.¹⁸¹

An unincorporated association or partnership should be treated in a similar manner. Under prevailing doctrine such an organization has no citizenship of its own, but the citizenship of its members determines whether or not diversity is present.¹⁸² Thus, under the complete diversity rule, a large association such as a labor union is rarely able to sue or be sued on the basis of diversity jurisdiction unless resort is had to the mollifying device of the class

Limitations on Federal Jurisdiction, 11 STAN. L. REV. 213, 214, 225 (1959); Kessler, *supra* note 164, at 246-47.

¹⁷⁷ *Cope v. Anderson*, 331 U.S. 461, 467 (1947) (citizenship applies even after insolvency); *Herrmann v. Edwards*, 238 U.S. 107 (1915); *Continental Nat'l Bank v. Buford*, 191 U.S. 119 (1903); *Ex parte Jones*, 164 U.S. 691 (1897); *Petri v. Commercial Nat'l Bank*, 142 U.S. 644 (1892); 28 U.S.C. § 1348 (1958). *But see McGovney, supra* note 158, at 1119-24, contending that this jurisdiction, although treated like diversity jurisdiction, is in fact a constitutionally based federal question jurisdiction. For a discussion of federal question jurisdiction and its applicability to national banks, see MOORE ¶ 0.60[S.-3]. See also *Atwood v. National Bank*, 115 F.2d 861 (6th Cir. 1940) (applying regular diversity rules to an action against a national bank).

¹⁷⁸ See HENN, *CORPORATIONS* § 12 (1961).

¹⁷⁹ See Moore & Weckstein, *supra* note 167, at 1438-45.

¹⁸⁰ *Id.* at 1444-45.

¹⁸¹ See Weckstein, *Multi-State Corporations and Diversity of Citizenship: A Field Day for Fictions*, 31 TENN. L. REV. 195 (1964).

¹⁸² See *Thomas v. Board of Trustees*, 195 U.S. 207 (1904); MOORE ¶ 17.25; WRIGHT, *FEDERAL COURTS* 78-79 (1963).

action.¹⁸³ Since many unincorporated associations do not differ in a functional sense from corporations and even their structural organization and characteristics are growing closer together,¹⁸⁴ there seems to be no good reason for treating the two differently for purposes of diversity jurisdiction.¹⁸⁵ The citizenship of the owners or members of an association would appear to be no more material than the citizenship of a corporation's stockholders, and the state of registration or formation would also be equally unreliable in both cases; whereas the location of either kind of enterprise's principal place of business would seem to be a sensible criterion by which to determine citizenship.

Our recommended treatment of partnerships and unincorporated associations is similar to that proposed by the second tentative draft of the ALI study group,¹⁸⁶ but our proposals differ in material respects regarding the treatment of corporations. The ALI Reporters carry forward the 1958 amendment's provisions with two clarifying and desirable additions. One is to make a corporation a citizen of "every" state in which it is incorporated as well as of the state where its principal place of business is located, and the second is to apply this dual basis of citizenship to foreign corporations as well so that an alien corporation could also be deemed a citizen of any state in the United States in which it might have its principal place of business.¹⁸⁷ The Reporters go further, however, by prohibiting a corporation which has maintained a local establishment in a state for more than two years from invoking diversity jurisdiction in any action related to the activities of that establishment.¹⁸⁸ We consider this provision part of a misguided attempt to unduly curtail the jurisdiction of the federal courts in that it too narrowly conceives the purposes underlying the establishment and continuance of federal court jurisdiction in general and of diversity jurisdiction in particular.

We must make a similar objection to the ALI committee's proposals to prohibit a person from invoking the diversity jurisdiction in his own state, or in a state where he has commuted to his principal place of business or place

¹⁸³ FED. R. CIV. P. 23; MOORE ¶¶ 23.02, 23.13; WRIGHT, *FEDERAL COURTS* § 72 (1963).

¹⁸⁴ See HENN, *CORPORATIONS* §§ 16, 257-59 (1961); 1 O'NEAL, *CLOSE CORPORATIONS* §§ 1.02, 1.07, 1.12 (1958); STEVENS, *PRIVATE CORPORATIONS* §§ 4, 11 (1949); Conway, *The New York Fiduciary Concept in Incorporated Partnerships and Joint Ventures*, 30 *FORDHAM L. REV.* 297, 303-06, 320, 323-24 (1961); Manning, *The 1961 Amendments to the Connecticut Corporation Acts*, 35 *CONN. B.J.* 460, 475-76 (1961); Snyder & Weckstein, *Quasi-Corporations, Quasi-Employees and Quasi-Tax Relief for Professional Persons*, 48 *CORNELL L.Q.* 613, 655-709 (1963).

¹⁸⁵ See MOORE ¶ 17.25; STEVENS, *PRIVATE CORPORATIONS* § 11 (1949); Comment, 47 *Geo. L.J.* 491, 510-11 (1959); Note, 68 *YALE L.J.* 1182, 1196-97 (1959); 46 *VA. L. REV.* 346 (1960). A recent amendment concerning direct action suits in the federal courts treats the citizenship of an insurance company in the same way whether it is incorporated or unincorporated. See note 88 *supra*.

¹⁸⁶ ALI, *op. cit. supra* note 141, at 8, 10, 60-62.

¹⁸⁷ *Id.* at 8, 10, 58-60.

¹⁸⁸ *Id.* at 11, 12-13, 68-73.

of employment for more than two years if the claim is substantially related to events or property in that state.¹⁸⁹ As previously indicated, we believe that as long as citizens of different states are the real parties in interest in a justiciable controversy, a sufficient federal element is present and either party should be able to invoke the diversity jurisdiction of the federal courts regardless of whether or not he is a citizen of the state in which the suit is brought. This position in regard to individual citizens is not inconsistent with the view we take of the citizenship of corporations and unincorporated associations. In the former case the individual is the real party in interest, but in the latter the individual members are only indirectly affected and it is the organization itself, the aggregate of all the members bound together by their economic investment, that is the true party in interest. Thus the principal place of business is an appropriate criterion by which to govern an incorporated or unincorporated association's access to the federal courts but is inappropriate in regard to a natural person acting in his individual capacity.

Since fear of local prejudice or of the kind of justice available in the state courts of one's adversary is not the only contemporary basis of diversity jurisdiction, a doctrine which prohibits the invocation of the jurisdiction in one's own state is not justified. Such an approach, which holds that the presence or absence of federal court jurisdiction of the same controversy between the same parties depends upon whether the plaintiff sues at home or goes to the extra expense and effort of suing away from home, "fails to satisfy the untechnical requirements of ordinary common sense."¹⁹⁰ Accordingly, to make the federal courts equally available to both parties in any state we would also eliminate the existing prohibition against removal of a suit brought in the court of the state of which the defendant is a citizen.¹⁹¹

Removal jurisdiction should be further expanded, as the ALI report recommends,¹⁹² to allow any defendant who would have been able to remove if sued alone to remove the entire action with discretion in the trial court to remand such otherwise non-removable parts of the suit. We also concur in the ALI proposal to allow removal by the original plaintiff on the basis of the defendant's counterclaim, or by the defendant on the basis of the amount in controversy in a counterclaim which he proposes to assert.¹⁹³

¹⁸⁹ *Id.* at 11, 12, 13, 67-68, 73-76.

¹⁹⁰ *Gavin v. Hudson & Manhattan R.R.*, 185 F.2d 104, 105-06 (3d Cir. 1950) (Goodrich, J.).

¹⁹¹ 28 U.S.C. § 1441(b) (1958); MOORE ¶ 0.161[1]. Consistently, we would also expand federal question jurisdiction by permitting removal, by the plaintiff or defendant, when the federal question appears in the defendant's answer or other pleading, as well as continuing the rule whereby the defendant may remove if the federal question appears in the plaintiff's well-pleaded complaint. Moore, *Problems of the Federal Judiciary*, 35 F.R.D. 305, 316 (1964).

¹⁹² ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 17-18, 85-91 (Tent. Draft No. 2, 1964).

¹⁹³ *Id.* at 17-19, 91-92.

We would go further, however, and completely eliminate the amount in controversy as a jurisdictional prerequisite. The purpose of this would be to clarify jurisdictional standards by untangling questions of jurisdiction from questions involving the value of a claim and to entitle all citizens of the United States to seek federal justice as long as they are willing to pay the costs. In this regard we would seek to protect the district judges from the burden of conducting small claims courts by shifting the amount requirement from a basis for determining jurisdiction to one guiding the assessment of costs. Thus, the district courts could be given authority, similar to that under the 1958 amendment, to assess costs—including a reasonable attorney's fee—against a plaintiff who institutes or a defendant who removes an action in which the amount in controversy, considered from either party's viewpoint, could not in good faith be said to exceed 10,000 dollars.

While we generally favor the expansion of federal jurisdiction, we recognize that federal courts are courts of limited jurisdiction, and that they should be mindful to stay within the limits provided by the constitutional distribution of judicial power between state and nation. Consequently, we would favor a prohibition against the manufacture of diversity jurisdiction by the appointment of an out-of-state personal representative or by a colorable assignment or otherwise. In these cases the test should be whether there is diversity of citizenship between the parties who really are interested in the litigation and not the parties who may because of their formal office be able to sue or be sued in their own name. There is at present sufficient authority to permit the courts to reach the result we are advocating,¹⁹⁴ but recent judicial precedents indicate an opposite trend,¹⁹⁵ and appropriate legislative action may be desirable.¹⁹⁶

In this regard, we believe that the insurance company defendant in a direct action is a real party in interest. Accordingly, we disapprove of the recent amendment to section 1332(c) which deems an insurer to be a citizen of the state of the insured in a direct action against the insurance company in which the insured is not joined as a party defendant.¹⁹⁷ This amendment was passed in order to reduce the caseload of federal district judges in Louisiana where the plaintiffs seek to avoid the broader review of a jury verdict by the Louisiana appellate courts by invoking diversity jurisdiction against an out-of-state insurance company without joining the local tortfeasor

¹⁹⁴ 28 U.S.C. § 1359 (1958); MOORE ¶¶ 17.05-.06.

¹⁹⁵ *E.g.*, *County of Todd v. Loegering*, 297 F.2d 470 (8th Cir. 1961); *Corabi v. Auto Racing, Inc.*, 264 F.2d 784 (3d Cir. 1959), 75 A.L.R.2d 717 (1961).

¹⁹⁶ See H.R. 4344, 87th Cong., 1st Sess. (1961); ALI, *op. cit. supra* note 192, at 8-10, 63-65.

¹⁹⁷ Pub. L. No. 88-439 of Aug. 14, 1964, 78 Stat. 445, amending 28 U.S.C. § 1332(c) (1958); see note 88 *supra*.

insured.¹⁰⁸ This situation should have been dealt with by increasing the number of district judges in Louisiana. As the party which will have to pay the judgment, an insurance company certainly has at least as strong a real interest in the case as the insured. When the parties believe that better justice is available in the federal courts and they sue only an insurance company which is neither incorporated in Louisiana nor has its principal place of business there, the case is one which should properly be regarded as being within the jurisdiction of the federal courts. It is, despite the expressed opinions of others,¹⁰⁹ within the letter, spirit, and intent of the purposes of federal diversity jurisdiction.

We have not surveyed every area in which improvements might be made in the scope and application of diversity jurisdiction; perhaps we have already exceeded the reasonable bounds of time, space, and consideration of the reader's patience, but to go even further would clearly do so. Thus, we can only hope to have accomplished a limited purpose, not to expound on what we consider the only road to salvation—for our present system is relatively speaking quite good, nor to launch an attack on the recommendations of the ALI special study group on diversity—for much time and effort has gone into the study and many parts of their proposals and discussion are excellent. Rather it has been our purpose to consider in historical perspective some of the ways in which improvements may be made toward the end of achieving justice under our federal system. We are not naive enough to believe that we have presented "the" answer any more than the ALI reporters have, but we do hope that we have provoked thought and contributed something of value in regard to problems which we as lawyers are too often complacent about or to which we are too eager to accept easy solutions which take into account only one or two factors of the many which may be relevant.

¹⁰⁸ S. REP. NO. 1308, 88th Cong., 2d Sess., U.S. CODE CONG. & AD. NEWS 2458 (1964).

¹⁰⁹ S. REP. NO. 1308, 88th Cong., 2d Sess., U.S. CODE CONG. & AD. NEWS 2458, 2464 (1964); see *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53 (1954) (concurring opinion).

Choice of Law and the Federal System

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After attempting for several years to teach the rules devised for the resolution of choice-of-law problems, I have concluded that those rules do not yield satisfactory results. If this impression is sound,¹ the time for serious effort at improvement is at hand; for the growing number of choice-of-law problems makes the need for improvement urgent. Two interrelated factors impose a mounting strain upon our choice-of-law system. First, members of our society, in both their personal and business activities, increasingly disregard the existence of state boundaries. As individuals we live in one state but vacation, engage in commercial transactions, and in some instances find daily occupation in other states. The activities of our business associations to an even greater extent are conducted on a regional or national rather than state level. An ever larger fraction of potentially litigious events have multistate contacts. Secondly, rules governing in personam jurisdiction have changed markedly. Both individuals and business enterprises are amenable to service of process outside their domicile in a widening range of situations.² The result is that the inadequacies of our choice rules have more serious consequences for local government policies.

In this paper I make several principal suggestions. First, the deficiencies of present choice-of-law rules are attributable in large part to a lack of foundation on intelligible normative criteria. Without such a foundation, reasoned extrapolation from one case to the next is impossible. Secondly, an examination of choice problems and of the basic premises on which our federal system rests

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1. Many more experienced writers apparently agree with this evaluation. See Cook, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933), ASS'N OF AMERICAN LAW SCHOOLS, *SELECTED READINGS IN CONFLICT OF LAWS* 101 (1956) [hereinafter cited as A.A.L.S. READINGS]; Currie, articles cited note 13 *infra*; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 234.

2. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Milliken v. Meyer*, 311 U.S. 457 (1940); *Hess v. Pawloski*, 274 U.S. 352 (1927).

reveals normative principles which could and should serve as a foundation for choice-of-law rules. Thirdly, these normative principles suggest not only a new body of choice rules, but also a different allocation between state and federal courts of responsibility for the articulation of those rules.

I. OBSERVATIONS ON PRESENT CHOICE DOCTRINE

Only the lawyer, specially disadvantaged by his professional training, could assert as an original proposition that a contract case *ought* to be decided according to the law of the place where the contract was made³ or that a tort case *ought* to be decided by the law of the place of injury.⁴ A layman might accept similar descriptive statements, but he surely would question them in normative form.

The lawyer's defenses of these prescriptions are now widely acknowledged to be inadequate.⁵ Any argument based on expectations of the parties⁶ is circular, because the expectations to be protected result from the fact that courts in the past have generally made those choices; many other choice criteria, once generally accepted, would protect expectations as well. A defense invoking the objective of uniformity of outcome⁷ is also circular; it rests on the premise that all other courts would make the same choices. Nothing unique about the place where a contract is made or the place of injury, except their wide use as conflicts reference points, entitles those choice rules to approbation.

I do not mean to suggest that predictability and uniformity of outcome are not objectives worth seeking in the process of elaborating a choice-of-law system. The terms predictability and uniform-

3. See 2 BEALE, *CONFLICT OF LAWS* § 332.4 (1935); GOODRICH, *CONFLICT OF LAWS* §§ 108-10 (3d ed. 1949); RESTATEMENT, *CONFLICT OF LAWS* § 332 (1934); STUMBERG, *CONFLICT OF LAWS* 226-32 (2d ed. 1951).

4. See 2 BEALE, *CONFLICT OF LAWS* §§ 377.2, 378.2 (1935); GOODRICH, *CONFLICT OF LAWS* §§ 92-93 (3d ed. 1949); RESTATEMENT, *CONFLICT OF LAWS* §§ 377, 379 (1934); STUMBERG, *CONFLICT OF LAWS* 182-87 (2d ed. 1951).

5. See, e.g., the criticisms of COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* *passim* (1942); Currie, articles cited note 13 *infra*; Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1, 6-14 (1951); Ehrenzweig, *Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement*, 23 U. CHI. L. REV. 474 (1956); Ehrenzweig, *American Conflicts Law in Its Historical Perspective, Should the Restatement Be "Continued"?*, 103 U. PA. L. REV. 133 (1954).

6. See GOODRICH, *CONFLICT OF LAWS* 261 (3d ed. 1949), discussed in text accompanying note 9 *infra*; cf. Beale, *What Law Governs the Validity of a Contract?*, 23 HARV. L. REV. 260, 271-72 (1910), A.A.L.S. READINGS 629, 638. The protection of the expectations of the parties has been advanced as the principal justification for the "intention of the parties" choice rule. Rheinstein, Book Review, 15 U. CHI. L. REV. 478, 485-87 (1948).

7. See the discussion in Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 382 (1945), A.A.L.S. READINGS 48, 62 (1956).

ity, often loosely used, include three interrelated but distinct concepts. The first, primary predictability, is the ability of persons (or their attorneys), at the time they are conducting their business or driving their automobiles or drawing their wills or engaging in analogous activities other than litigation, to predict what the legal consequences of that conduct, if litigated, would be held to be. Primary predictability is undoubtedly more important to certain types of human activity than to others, *e.g.*, to consensual arrangements than to personal injuries; but that it is a goal worthy of pursuit few would deny.

Primary predictability depends on the other two concepts, secondary predictability and doctrinal uniformity. By secondary predictability I denote the ability of parties to predict the legal consequences a particular forum will attach to past conduct once the litigation stage has been reached and the identity of the forum is known. Secondary predictability depends on factors such as doctrinal clarity within the identified forum and the specificity of the criteria embodied in that doctrine. Predictability at this secondary level, too, may have some utility. Arguably, it facilitates settlements and reduces the cost that litigation imposes upon both the parties and the community.

Doctrinal uniformity among courts is a necessary condition to primary predictability because in an ever larger fraction of potentially litigious situations it is impossible to predict the forum in which litigation will occur. Unless there is doctrinal uniformity among the potential forums, primary predictability is thwarted. Moreover, if doctrinal uniformity is lacking, secondary predictability has undesirable consequences which may fully offset its inherent utility: the spectre of forum shopping and race to judgment becomes a realistic possibility when parties are faced with predictable nonuniformity between available tribunals.

While primary predictability, because of its impact on the ordering of human affairs, must be regarded as an important objective, it is an inadequate normative basis for traditional choice-of-law rules. Any choice rules, uniformly adopted and applied, would serve that objective. Even if one were to conclude that no normative criterion other than predictability is available on which to build a body of choice rules, rules superior to the traditional ones could easily be found. As means to the end of predictability, choice rules like the place of contract execution are vulnerable to attack, not because they are too rigid, but because they are not rigid enough.

When, and therefore where, binding agreement occurred is often debatable.⁸ That more rigid choice rules easily could be but have not been devised strongly suggests that the profession has not yet concluded no objectives other than predictability exist to be served. Yet there is no consensus as to the identity of other objectives.

An excerpt from Judge Goodrich's treatise illustrates many of the weaknesses of present doctrine. Commencing his discussion of choice of law, he poses the following situation:

Suppose a hypothetical plaintiff, P, is in Massachusetts. While there he is protected by . . . Massachusetts law. That law recognizes certain interests of P as entitled to protection, as, for instance, P's unimpaired bodily condition. If D, the defendant, injures P . . . *P has a claim in Massachusetts . . .* Now that law should determine [the outcome] . . . regardless of the place where suit is brought. The rights and liabilities of P and D ought in all fairness to be adjudicated in accordance with Massachusetts tort law. *It was the only law in control where the injury complained of occurred.* To determine the rights and liabilities by the law of some other place would impose a *criterion which would not have been foreseen by at least one of the two parties . . .*⁹

In his treatment, characteristic of much choice-of-law analysis, Goodrich speaks in strongly normative terms. He justifies his prescription by reference to the situation of the immediate parties; but his explanation of why, "in all fairness," Massachusetts law should be applied rests upon the two circuitous arguments previously noted: that uniformity is desirable—*i.e.*, uniformity with the *presumed* result in Massachusetts; and that application of different law would upset the expectation of "at least one of the . . . parties"—*i.e.*, an expectation that, if existent at all, can have its basis only in past adjudications invoking the same choice rule the argument urges.

II. THE SEARCH FOR NORMATIVE CRITERIA

As is consistent with the generally healthy concern for pragmatic consequences that has characterized recent jurisprudential thought, most attempts to identify a normative basis for choice criteria have focused upon the interests of the immediate parties

8. The ease of disagreement cannot be better illustrated than by consideration of the majority and dissenting opinions in *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 377 (1918). Compare the *Dodge* opinion with the contrary conclusion reached by Mr. Justice Holmes in *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209 (1922), on virtually indistinguishable facts. See, *e.g.*, *Emery v. Burbank*, 163 Mass. 326, 39 N.E. 1026 (1895); *Milliken v. Pratt*, 125 Mass. 374 (1878), in which the courts, without express justification, each selected one rather than another tenable view of the point in time at which a contract became binding, thus influencing choice of applicable law.

9. GOODRICH, *CONFLICT OF LAWS* 261 (3d ed. 1949). (Emphasis added.)

to the transaction¹⁰ and thus upon the same factors that would be dispositive in a similar case wholly internal to a single state. I cannot escape the conclusion that a search so oriented must prove unrewarding. Every choice-of-law case involves several parties, each of whom would prevail if the internal law of one rather than another state were applied. Each party is "right," "worthy," and "deserving" and "ought in all fairness" to prevail under one of the competing bodies of law and in the view of one of the competing groups of lawmakers. Fact situations which differ only in that they are internal to a single state have been assessed by the different groups of lawmakers, and each has reached a different value judgment on the rule best calculated to serve the overall interest of its community. If attention is confined to the circumstances of the immediate parties, the conflict between the internal laws and between the value judgments they are intended to implement cannot be resolved by the judge unless he is prepared to impose still another value judgment upon the controversy. The judge who takes this approach must conclude, for example, that legal systems recognizing past consideration in contract cases embody a juster justice than those that do not or conclude that legal systems imposing absolute liability in tort cases achieve results more desirable than those that apply the standard of negligence. The imposition of such super-value judgments is not, of course, intellectually impossible. Courts have, from time to time, resolved cases on this basis, though they seldom make the basis explicit.¹¹ Super-value judgments have been urged, somewhat more explicitly, by commentators.¹²

The drawbacks of this approach, however, are easily identified. The judge is required to formulate law in a much more frank and open manner than is generally thought compatible with his non-political status. It lacks the protective apparent neutrality of traditional choice rules which, however flexible they actually are, allow the judge to apply them and then announce the result with a tone

10. See Cavers, *supra* note 1, at 192-93, A.A.L.S. READINGS 101, 114.

11. See, e.g., *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 624 (1947); *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927), discussed in Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1212-18 (1946); *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953); *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 Atl. 163 (1928).

12. Freund, *supra* note 11, at 1216; see Lorenzen, *Tort Liability and the Conflict of Laws*, 47 L.Q. REV. 483, 492-93 (1931). See the approving discussion of the origins of the doctrine of the "more effective and more useful law" in Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 301-02 (1953), A.A.L.S. READINGS 30, 34.

that suggests he himself was surprised by the outcome. Necessarily a super-value judgment is disputable: the very occasion for its articulation is the existence of a contrary judgment reached by one of the contending bodies of internal lawmakers. Finally, the objective of primary predictability is not likely to be furthered. The uniformity of outcome on which it depends will exist only if the same super-value judgment is reached in all forums, consistently subordinating the same local value judgment. One of the most probable forums is the state that has adopted, for internal purposes, the value judgment to be subordinated. The judges of that state are unlikely to reach a super-value judgment in conflicts cases contrary to judgments they previously reached in internal cases which the approach does nothing to distinguish.

These difficulties can be avoided if normative criteria can be found which relate to the very aspects of a conflicts case that distinguish it from an analogous internal case. That such criteria can be elaborated in many, if not all, conflicts cases has been demonstrated by several writers¹³ who have urged that conflicts cases be resolved on the basis of the governmental interests involved.¹⁴

Because my thesis of the role of the federal courts in conflicts cases depends in substantial part on my view of the governmental interest analysis, an exposition of that view is necessary. Rules of internal law are characteristically phrased in universal terms.¹⁵

13. Professor Currie's treatment has been the most extensive. His thesis is set forth in general terms in Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171. For the application and development of his analysis in relation to specific conflict-of-laws problems, see Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958); Currie, *The Constitution and the "Transitory" Cause of Action* (pts. 1-2), 73 HARV. L. REV. 36, 268 (1959); Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959); Currie & Liebermann, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1960 DUKE L.J. 1; Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960); Currie & Shreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960); Currie & Shreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960); Currie, Book Review, 73 HARV. L. REV. 801 (1960); Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258 (1961); Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1.

14. For early studies suggestive of the governmental interest approach, see Freund, *supra* note 11, at 1216-17, 1223-24; Hancock, *Choice-of-Law Policies in Multiple Contact Cases*, 5 U. TORONTO L.J. 133, 136-37, 142-43 (1943). The courts also have recognized the usefulness of the analysis in conflict of laws. See, e.g., *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935); *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957).

15. See, e.g., "[A]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law," Jones Act, 41

State *X* provides, by statute or judicial decision, that *every* person who harms another shall be liable to the other if, but only if, harm was caused by conduct creating an unreasonable risk of harm to the other. This rule requires no relationship between the occurrence or the parties and State *X* as a condition precedent to its application. Yet the lawmakers of State *X* would concede, if their attention were focused on the point, that State *Y* might properly treat differently some cases like those to which State *X* would apply its rule. State *Y* might, for example, apply a rule of absolute liability to cases of a food processor distributing an adulterated product.

Consider the course of discussion that would occur if the lawmakers of *X* and *Y* assembled for interstate negotiations on the scope of application of the inconsistent rules. Each group at the outset might unreasonably demand application of its law in every situation having any contact with its state. But as each became aware that the other had roughly equal bargaining power and tactical skill, the usual fruits of negotiation would emerge: each would cautiously give up what it wanted less to obtain what it wanted more, each side's perception of its own self-interest and of the other's objectives would sharpen, and the final agreement would approximate maximum utility to each. In the course of negotiations the participants would realize the basis of this particular conflict of law: the lawmakers had allocated differently certain costs of civilized society. *X* lawmakers were more favorably disposed to food processors than were *Y* lawmakers; *Y* lawmakers, comparatively speaking, favored consumers. Neither group was oblivious to the welfare of the category of persons it had, in the immediate context, treated less favorably: *Y* lawmakers afforded legal protection to food processors in other contexts, and *X* lawmakers protected consumers—even vis-à-vis food processors—where negligence was shown. But that each had reached different comparative judgments regarding product liability is evident. And from that conclusion, the paramount negotiating objective of each becomes clear: the same value judgment that dictated the respective internal rules of law now dictates the choice-of-law objective. *X* lawmakers want *X* law to apply in cases involving *X* food proc-

Stat. 1007 (1920), 46 U.S.C. § 688 (1958); "No trust in relation to real property is valid unless created or declared . . . by a written instrument," CAL. CIV. CODE § 852; "No person, company, association or corporation shall . . . take or receive . . . any greater sum . . . for the loan or forbearance of money . . . than at the rate of twelve dollars upon one hundred dollars for one year," CAL. CIV. CODE § 1916-2.

essors, and Y lawmakers want Y law to apply in cases involving Y consumers. Because the objective of Y is not necessarily inconsistent with that of X, negotiating progress can be made. X is willing to relinquish to the Y sphere of influence cases not involving X processors in exchange for bringing within its legal control cases involving X processors; Y takes a similar position with respect to Y consumers.

Although the scope of agreement probably does not cover even a majority of possible conflicts cases involving the two laws, the negotiators have made significant progress. It inheres in their recognition that internal rules affecting private rights are focused on people, as individuals or groups; that such rules prefer one group to another in particular situations; that a conflict of laws occurs when different states make opposite preferences; that a state has a claim to the application of its law in a case involving a member of the group it prefers who is identified with that state; and that this claim ought to be dispositive of the case if the other state has no countervailing claim.

The cases disposed of by the above points of agreement are those Professor Currie has called false conflicts cases.¹⁶ They are false because the contending rules of law conflict only in the abstract. They do not conflict in the particular case because the social or economic interest comparatively favored by X is identified with X, making X's rule pertinent; but the interest comparatively favored by Y is not identified with Y, so application of X's rule will not impair the policy of Y's rule. Such cases, Currie says, can and should be resolved on a normative basis—on the basis of the pertinence to the case of the contending rules.¹⁷ With this position I agree.

I disagree, however, with Currie's conclusion that real conflicts cases, cases in which each state has some interest in the application of its law, should not be similarly resolved but should be decided

16. Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 239-40 (1958); Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 251-52 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 10 (1958).

17. See Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 241-43 (1958); Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 254-59 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9-10 (1958).

by applying the rule of the forum.¹⁸ The same analysis by which Currie distinguishes real from false conflicts cases can resolve real conflicts cases. The question "Will the social objective underlying the *X* rule be furthered by the application of the rule in cases like the present one?" need not necessarily be answered "Yes" or "No"; the answer will often be, "Yes, to some extent." The extent to which the purpose underlying a rule will be furthered by application or impaired by nonapplication to cases of a particular category may be regarded as the measure of the rule's pertinence and of the state's interest in the rule's application to cases within the category. Normative resolution of real conflicts cases is possible where one of the assertedly applicable rules is more pertinent to the case than the competing rule.

There will, of course, be cases in which the contending state interests appear to be in balance or nearly so. Borderline cases arise that thwart easy application of every principle of law, but they are decided nonetheless. The judge decides on the basis of some marginal factor and justifies his decision as best he can in his opinion. That some choice cases share this common fate seems preferable to subjecting them and many more to the law of the forum, a particularly undesirable mode of resolving choice questions. By eliminating doctrinal uniformity, a rule calling for application of the law of the forum impairs predictability in all primary situations unless it is then possible to assert that litigation in more than one state will never be possible. Moreover, it introduces predictability at the secondary, or litigation, level where the disadvantages of predictability may equal its advantages. In these respects Currie's proposal compares unfavorably with any rule of decision, however arbitrary, that facilitates primary predictability.

Professor Currie attempts to parry this point by suggesting that the evils of forum-shopping have been exaggerated.¹⁹ The social costs of forum-shopping are difficult to estimate, but every attorney knows it is practiced,²⁰ and some social costs are clear. Early filing,

18. Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 243 (1958); Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 261-62 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 10 (1958). Professor Currie's reasons for this conclusion are discussed briefly in text accompanying note 21 *infra* and in more detail in text accompanying notes 40-43 *infra*.

19. Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 244-45 (1958).

20. Indeed, an ethical problem would be raised by a suggestion that an attorney should

often detrimental to negotiated settlements, is encouraged. The forum selected frequently is not the most economical for either party. Jurisdictional disputes are engendered because personal jurisdiction over the defendant in the selected forum may be dubious. Even if the totality of these costs is far less than is generally supposed and would be outweighed by any other sound objective, what is the competing objective that commends itself to Currie? The only answer I find in his writings is as conceptualistic as the traditional choice rule he so effectively assails. He thinks it is irrational and unobjective for a court to apply any law other than its own to real conflicts cases. He seems to think a court constitutionally incapable of, and perhaps Constitutionally prohibited from, subordinating a policy of its own state that has *any* pertinence to the case at hand;²¹ at least he does not regard the jurisprudential objective of primary predictability a sufficient reason for such subordination.

I cannot believe my hypothetical assembly of *X* and *Y* lawmakers would accept either of those conclusions. They rejected resort to general choice rules, such as applying the law of the place where the food was consumed, precisely because such rules subject to the application of *Y* law cases in which only *X* had an interest. Obviously *X* lawmakers opposed such frivolous subordination of their policy; but, significantly, so did *Y* lawmakers because they realized there was negotiating mileage to be derived from those cases. Both groups knew that the objectives of each would be maximized by exchanging unwanted spheres of control for desired spheres. Surely they would realize that the principle of maximization applies as well to exchanges of the less wanted for the more wanted, however narrow the margin of utility.²²

Differences in the degree of pertinence of a state's law to a given case may often be perceived by focusing more sharply on the character of identification that exists between the comparatively fa-

file an action in the most "convenient" forum although, in his professional judgment, the interests of his client would best be served by filing in a different forum where a more favorable rule of law would be applied.

21. See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 81-82 (1958).

22. I do not mean to suggest that any dispute amenable to solution by negotiation is amenable to resolution by adjudication; clearly that is not so. See Fuller, *The Forms and Limits of Adjudication*, 1960 PROCEEDINGS AM. SOC'Y INT'L L. *passim*. The particular dispute subject to the hypothetical negotiation exhibits characteristics that make it amenable to adjudication, however. The most important of these characteristics is the common purpose to allocate control over a mass of disparate situations in accordance with a single, objective, commonly held criterion.

vored interest and the state. In the food processor-consumer, negligence-absolute-liability illustration,²³ X's objective is furthered and hence X law is relevant in cases involving food processors identified with X; Y's law of absolute liability is relevant in cases involving consumers identified with Y. It does not necessarily follow in a case involving an X processor and a Y consumer that the governmental interests are in balance.²⁴ The terms "X processor" and "Y consumer" are both conclusional expressions capable of embracing a great variety of factual situations. The prima facie pertinence of Y law will be diminished if the consumer, though residing in Y, is domiciled in X (or in any other state which follows the X rule) or if he has died and a wrongful death or survival action is being maintained for the benefit of relatives identified with X (or any other state which follows the X internal rule).²⁵ Conversely Y's rule of absolute liability may control notwithstanding the existence of an X interest if the food processor, though incorporated in X, has its principal place of business in Y or if the processor, for any reason, is less identifiable with X than is the consumer with Y.

Internal rules intended to regulate conduct pose somewhat different problems from rules intended merely to distribute economic losses, but they are also susceptible to analysis in terms of governmental interests. In this context, as in the other, lawmakers often speak in universal terms but must be understood to speak with reference to their constituents. Here too the resolution of conflict-of-laws cases is essentially a process of allocating respective spheres

23. In the discussion to follow, an attempt will be made to suggest the solution to several hypothetical problems by an analysis of the comparative pertinence of the competing governmental interests involved. The overwhelming weight of American authority is inconsistent with this analysis; except in rare instances, the references in notes 24-36 *infra* are not cited as authority for the analysis presented, but as illustrations of results consistent with those that would follow from application of the thesis of this Article.

24. In cases where a manufacturer in one state has been held liable to a consumer in another, the courts have faithfully followed the *Restatement* catechism and applied the law of the consumer's state as the place of injury. See, e.g., *Hunter v. Derby Foods, Inc.*, 110 F.2d 970 (2d Cir. 1940); *Hughes Provision Co. v. La Mear Poultry & Egg Co.*, 242 S.W.2d 285 (Mo. Ct. App. 1951), both recognizing liability without negligence for violation of an Ohio penal statute. See generally Ehrenzweig, *Products Liability in the Conflict of Laws—Toward a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws"*: II, 69 YALE L.J. 794 (1960).

25. In actions for wrongful death, some courts have applied not the law of the place of injury but that of the place of death. See, e.g., *Hoodmacher v. Lehigh Valley R.R.*, 218 Pa. 21, 66 Atl. 975 (1907). This choice has been justified on the assumption that the action is for the benefit of dependents of the decedent who normally reside at the place of death. See EHRENZWEIG, *CONFLICT OF LAWS* § 211, at 547 (1962); cf. Shuman & Prevezer, *Torts in English and American Conflict of Laws: The Role of the Forum*, 56 MICH. L. REV. 1067, 1107 (1958).

of lawmaking influence; and if the process is to have a normative basis, the criterion must be maximum attainment of underlying purpose by all governmental entities. This necessitates identifying the focal point of concern of the contending lawmaking groups and ascertaining the comparative pertinence of that concern to the immediate case.

For reasons beyond the scope of this paper, no choice-of-law problem is thought to exist when regulatory provisions come to bear in a penal²⁶ or licensing context.²⁷ The choice problem becomes apparent, however, when the lawmakers of State *X* implement regulatory provisions by loss-distribution subrules. Vehicle speed rules, for example, may be implemented by a per se negligence subrule. Suppose a State *Y* resident, while driving a truck on State *X* highways in violation of the *X* speed limit, causes injury to another resident of *Y*, and *X* but not *Y* attaches a per se negligence subrule to violations of its speed limits. *Y* lawmakers have a superior claim to control loss-distribution rights and duties between the *Y* residents involved. Although no *X* resident is involved, the fact that the proscribed conduct took place in *X* cannot be dismissed as irrelevant. The objective of the *X* lawmakers in passing the speed limit and one of their objectives in establishing the per se subrule was to create a condition of safety for the principal users of the state's highways, *X* residents.²⁸ The application of *X*'s per se rule in a case involving only *Y* residents is not totally unrelated to that objective: effectuation of the regulatory purpose of the per se rule depends on deterrence, which depends on expectation of the rule's application.

26. The dictum of Mr. Chief Justice Marshall in *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825), that "the courts of no country execute the penal laws of another" has been applied in the choice-of-law context, sometimes narrowly, *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918), and sometimes broadly, *Doggrell v. Southern Box Co.*, 208 F.2d 310 (6th Cir. 1953), but has never been adequately justified. See GOODRICH, *CONFLICT OF LAWS* § 12 (3d ed. 1949); *RESTATEMENT, CONFLICT OF LAWS* § 611 (1934); STUMBERG, *CONFLICT OF LAWS* 172-74 (2d ed. 1951).

27. States will not enforce the licensing statutes of a sister state. *RESTATEMENT, CONFLICT OF LAWS* § 610, comment *c* (1934).

28. The per se rule may also be viewed as having a loss-distribution objective, but this would not affect the analysis set forth in the text.

The analysis proposed in this paper involves identification, in each case, of the objective or objectives underlying each of the competing internal rules. That process of identification will sometimes be difficult, and reasonable disagreement may exist regarding the objectives of various internal rules. The process, however, is a familiar one rather than a unique concomitant of the choice analysis proposed.

In the present and subsequent hypothetical cases used to illustrate application of the suggested analysis, I state the objectives I think commonly underlie various internal rules. A reader who disagrees with the objective assigned to any particular internal rule will probably disagree with the choice-of-law conclusion I suggest. But disagreement on that

Cases like this, requiring weighing of an *X* regulatory interest against a *Y* loss-distribution interest, pose difficult problems. Their solution is facilitated by an examination of a situation in which the loss-distribution interest is divided between the states and the regulatory interest also appears. I turn to several such situations and then will return to the case discussed in this paragraph.

If the *Y* driver causes injury to an *X* resident while driving in *X* at a speed in excess of the *X* speed limit, *X*'s per se rule should be applied. *X* has an interest in implementing its regulatory provision, and its interest in the application of its loss-distribution rule offsets *Y*'s corresponding loss-distribution interest. If an *X* driver causes injury to a *Y* resident while driving at excessive speed within *X*, the *X* per se rule should also be applied. *X* has an interest in implementing its regulatory provision, and again the respective loss-distribution factors offset one another.

If these conclusions are accepted, it seems to follow in the original per se rule hypothetical case involving only *Y* parties that *X*'s per se rule ought not to be applied. There, *X*'s regulatory interest stands alone in opposition to *Y*'s loss-distribution interest. The suggestion is not that some rough parity in the number of instances allocated to each state is to be achieved; rather, it is that the *X* regulatory interest will not be impaired significantly if it is subordinated in the comparatively rare instances involving two nonresidents, who are residents of a state or states that reject the per se subrule. Conduct on *X* highways will not be affected by knowledge of *Y* residents that the *X* per se rule will not be applied to them if the person they injure happens to be a co-citizen. To the extent that the objective of the per se rule is loss-distribution rather than regulation, *X* has no legitimate interest in the rule's application because neither party is identified with *X*.²⁹

Conflicts between internal rules that operate in consensual contexts but without regard to the intent of the parties are amenable to similar analysis. Modification is required, however, because the objective of primary predictability has maximum utility and therefore strongest claim to recognition in consensual and other planned transactions. The importance of predictability in consensual transactions counsels against allocation of control according to the *actual*

basis does not necessarily involve, and should be distinguished from, disagreement with the choice analysis suggested.

29. Cf. *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957). See also *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953).

identification of the parties with the several states, the criterion suggested for loss-distribution in nonconsensual transactions. To facilitate predictability the choice rule must be based on the situation as it appeared to the parties at the time of the transaction.

Take, for example, a situation in which State X has a usury statute and State Y does not. State X, as well as State Y, recognizes the commercial importance of performance of consensual undertakings and access to the largest possible number of customers. But in a particular class of situations X, unlike Y, has decided an exception should be made. X protects borrowers having defined characteristics from the consequences of their inadequate bargaining power or bad judgment. For internal purposes X may define the protected class broadly or narrowly and by characteristics the lender can ascertain and apply with ease or only with difficulty.

The focal point of concern of X lawmakers is the X borrower of the type protected internally. The X usury law should not be applied to a case not involving such a borrower;³⁰ to do so would not further any purpose of X and would defeat not only the contrary policy of Y but also the general, though qualified, policy of X favoring commercial freedom and reliance on undertakings.³¹

State X policy would be given maximum implementation by a choice rule that required application of X law in any case involving an X borrower of the class protected internally. Although involvement of an X borrower of the protected class is a necessary condition to the application of X law, it ought not to be a sufficient condition. The inconsistent policies of Y are entitled to accommodation. A choice rule based on the state identification of the lender would give maximum scope to Y's policies but would seriously impair those of X. The protection X has afforded its borrowers probably has several consequences. Local lenders may make loans to the better risks within the class at the maximum legal rate, a rate somewhat lower than otherwise would have been afforded them, rather

30. *But see* *Akers v. Demond*, 103 Mass. 318 (1869), in which the court indicated that a New York usury law would apply to an accommodation contract made in New York by a Massachusetts domiciliary.

Compare the extraordinary cases in which a contract, valid under the law of the state of both parties, has been held invalid by a court of that state, acting under a supposed compulsion to refer to the law of the place where the contract was made. *Burr v. Beckler*, 264 Ill. 230, 106 N.E. 206 (1914); *Nichols & Shepard Co. v. Marshall*, 108 Iowa 518, 79 N.W. 282 (1899).

31. For cases in which a contract, invalid under the law of the lender's state was upheld by application of the law of the borrower's state, see *Arnold v. Potter*, 22 Iowa 194 (1867); *Mott v. Rowland*, 85 Mich. 561, 48 N.W. 638 (1891); *Dugan v. Lewis*, 79 Tex. 246, 14 S.W. 1024 (1891).

than forego entirely that segment of business. But another part of the protected class is denied local loans and therefore has an incentive to borrow outside the state. If the law of the state where the loan is made or is payable³² or of the lender's state is the choice criterion, the purpose of the X lawmakers will be substantially impaired by the emergence of a flock of lenders just across the state line.³³

A choice rule based on the lender's knowledge of the borrower's residence and of other characteristics of membership in the protected class affords maximum implementation of the policies of both states. Consensual expectations of the lender would be protected except when he had reason to know the transaction was forbidden by X.³⁴ And the objectives of X, the borrower's state, would be shielded from wholesale evasion: the nature of the transaction assures that prior to extending credit the lender will discover in most cases the borrower's residence and in many cases other characteristics of membership in the protected class.

The same analysis should be applied to property cases, where the need for improvement of choice criteria is acute. The historical reason for the traditional situs reference³⁵—legal acquiescence in the de facto power of the situs state to effectuate its policies³⁶—has no relevance to our federal system.³⁷ Like other arbitrary choice

32. The prevailing practice in usury cases is to uphold the contract if it is valid under the law of either the state in which it is made or that in which it is to be performed. *Miller v. Tiffany*, 68 U.S. (1 Wall.) 298 (1863); see *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927); 2 BEALE, *CONFLICT OF LAWS* § 347.4, at 1241 (1935); STUMBERG, *CONFLICT OF LAWS* 237 (2d ed. 1951). However, some courts have invalidated contracts by following rigidly the law of the place where the contract was formed, see *Falls v. United States Sav. Loan & Bldg. Co.*, 97 Ala. 417, 13 So. 25 (1892); *Akers v. Demond*, 103 Mass. 318 (1869), or the law of the place of performance, see *Odom v. New England Mortgage Security Co.*, 91 Ga. 505, 18 S.E. 131 (1893); *Dickinson v. Edwards*, 77 N.Y. 572 (1879).

33. When courts have suspected evasion of the usury laws, doctrinal purity has been abandoned, and the usury law of the borrower's state has been applied even though the contract was valid under the law of the place where the contract was made or to be performed. See, e.g., *Bundy v. Commercial Credit Co.*, 200 N.C. 511, 157 S.E. 860 (1931); *Continental Adjustment Corp. v. Klause*, 12 N.J. Misc. 703, 174 Atl. 246 (1934); *Mirgon v. Sherk*, 196 Wash. 690, 84 P.2d 362 (1938).

34. For a case involving a married woman's accommodation endorsement at her residence in New Jersey of a note payable in New York, see *Chemical Nat'l Bank v. Kellogg*, 183 N.Y. 92, 75 N.E. 1103 (1905). Although the court noted that the validity of an endorsement is ordinarily determined by the law of the place where it is made, it held the married-woman defendant estopped from asserting nonliability under New Jersey law because the plaintiff had no notice of her New Jersey status.

35. "[E]very question arising with regard to land is to be governed by the law of the situs." 2 BEALE, *CONFLICT OF LAWS* § 214.1, at 939 (1935).

36. EHRENZWEIG, *CONFLICT OF LAWS* § 232, at 607 (1962); see *RESTATEMENT (SECOND), CONFLICT OF LAWS*, Topic 2, at 12-13 (Tent. Draft No. 5, 1959); STORY, *CONFLICT OF LAWS* §§ 7-9 (5th ed. 1857). See also Williams, *Land Contracts in the Conflict of Laws—Lex Situs: Rule or Exception*, 11 HASTINGS L.J. 159 (1959).

37. U.S. CONST. art. IV, § 1.

rules, the situs rule defeats maximum realization by each state of the policies underlying its internal laws. Rules of law can be justified only by reference to their impact on the interests of people. Property, unlike those who have interests in it, does not care about its ownership or the marketability of its title. These remarks are obvious to the point of banality; it should be equally obvious that the situs choice rule is defective on its face because the relationships relevant for choice criteria are those between sovereigns and people, not those between sovereigns and property.

It does not follow, of course, that the situs of property should never control. Persons who live in the vicinity of the property are the intended beneficiaries of many property laws, such as the laws of nuisance, and the location of the property and hence of those people often should control the applicability of those laws. But as to competing claims of ownership, situs is not a reliable choice criterion. Suppose, for example, that a man has lived with his wife and children for many years in State *X* and dies intestate leaving real estate in State *Y*. The law of *X*, that the widow takes one-third and the children take the remainder in equal shares, should control to the exclusion of the law of *Y*, that the widow takes one-half and the children take the remainder in equal shares.³⁸ The objective of intestacy laws is intrafamily distribution, and because no *Y* party is involved, the *Y* policy favoring widows is not pertinent to the case.

Different internal objectives would be involved, however, if the *X* decedent had devised *Y* real estate to members of his family, all of whom were domiciliaries of *X*, and if the terms of the will violated the permissible time period of *Y*'s Rule Against Perpetuities but were valid under *X*'s rule. *Y* attaches greater importance than *X* to freeing property from long-term restraints so that ownership and utilization will be subject to market forces, furthering economic development of the community. *X* attaches greater importance to testamentary freedom. Since real property is involved, the community and the people the *Y* time period is in-

38. *Cf. Slattery v. Hartford-Conn. Trust Co.*, 115 Conn. 163, 161 Atl. 79 (1932), a case involving personal property in which the court held that a claimant adopted in Michigan, which permitted inheritance from natural or adoptive parents, could inherit from his natural father, a domiciliary of Connecticut, even though Connecticut law limited succession to adoptive parents; *In re Piercy*, [1895] 1 Ch. 83, in which a devise by an English testator of lands in Italy to trustees upon trust for sale was upheld, in spite of the invalidity of the trusts under Italian law. See Professor Beale's criticism of this case, 2 BEALE, *CONFLICT OF LAWS* § 240.3, at 958-60 (1935).

The overwhelming weight of authority, of course, is that "the law of the state where the land is determines the devolution of interests therein upon the death of the owner intestate." *RESTATEMENT (SECOND), CONFLICT OF LAWS* § 245 (Tent. Draft No. 5, 1959).

tended to benefit are easily identified as those living in *Y* where the property is located. Although the situs has a strong claim to the application of its perpetuity rule, that claim must be balanced against the interest of the domiciliary state in effectuating the intentions of its testator. As in the usury situation, this is a planned transaction in which the nondomiciliary can usually anticipate the impact of any intention-defeating rule that choice doctrine makes applicable, including a rule announced by the situs. A reasonable accommodation of the states' interests requires application of the perpetuity rule of the situs except in unusual instances in which the testator was unaware that he was devising State *Y* real estate by his will. A case in which the *Y* real estate passed to the testator after he had executed a will containing a residuary clause and had then lost testamentary capacity would be such an instance. Situations in which a testator could not anticipate the application of *Y*'s rule are sufficiently rare so that the impairment of *Y*'s objective by the subordination of its perpetuity rule in those cases would be minimal. In these same unusual cases State *X* has the most persuasive claim for application of its more liberal time period, not because the objective of its perpetuity rule has become pertinent, but to implement the objective of its law of wills to facilitate planned testamentary dispositions of wealth.

The preceding group of hypothetical situations illustrates several propositions. First, in choice-of-law cases there are two distinct types of governmental objectives, internal and external. The internal objectives are those underlying each state's resolution of conflicting private interests. These objectives inhere in a case even if the fact situation is wholly localized to a single state. In a usury case, for example, the competing private interests of commercial freedom and protection of economically weak borrowers are present even if the case is wholly internal to either State *X* or State *Y*. External objectives are introduced when a transaction affects persons identified with different states. They are the objectives of each state to make effective, in all situations involving persons as to whom it has responsibility for legal ordering, that resolution of contending private interests the state has made for local purposes. In each real conflicts case the external objective of one state must be subordinated. The choice problem posed is that of allocating spheres of lawmaking control.

The second proposition the hypothetical situations illustrate is that one can articulate and apply a normative principle to determine

which external objective to subordinate. The principle is to subordinate, in the particular case, the external objective of the state whose internal objective will be least impaired in general scope and impact by subordination in cases like the one at hand.

Implicit in the principle is an assertion that a court can and should go beyond a determination whether a state has *any* governmental interest in the application of its internal law—that a court can and should determine which state's internal objective will be least impaired by subordination in cases like the one before it. This determination is very different in kind from the weighing process often referred to by similar rubrics, but the two are often confused. Professor Freund, for example, in an early statement of a governmental interest analysis of choice-of-law problems, speaks of weighing the interests of the several states; he clearly envisions the super-value-judgment approach at several points in his article³⁹ but is concerned with the comparative impairment of conflicting local objectives at other points.⁴⁰ Professor Currie, too, in arguing that courts should not attempt to weigh the contending interests in real conflicts cases, subsumes both the super-value-judgment approach and the comparative-impairment analysis within his prohibition;⁴¹ he states that he sees little difference between the two.⁴² Therefore, in arguing that courts should not weigh, Professor Currie has not found it necessary to articulate separate arguments against the super-value-judgment and the comparative-impairment analysis. With respect to both he has counseled against judicial resolution on two bases: First, courts are inadequately equipped to discover the facts upon which resolution must turn; and secondly, such resolution is a highly political function not to be committed to courts in a democracy.⁴³

39. See Freund, *supra* note 11, at 1215, 1216, 1224.

40. See *id.* at 1223–24.

41. See Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176–77; Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 75–84 (1958); Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258, 271–76 (1961). For Professor Currie's criticism of commentators advocating the super-value-judgment and "form-free" approach to conflicts problems, see Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 230 (1958); Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 249–51 (1958).

42. See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 76–77 (1958).

43. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176; Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 75–84 (1958).

I agree with Currie's conclusion regarding super-value judgments for reasons which are stated earlier in this Article⁴⁴ and may correspond to the second basis he offers. Neither of Currie's objections seems to me to be a compelling argument against judicial resolution of choice problems by application of the principle of comparative impairment. The inquiries that must precede application of this principle are often difficult. Judicial attempts to apply the principle often would be accompanied by inadequately articulated opinions and sometimes would be demonstrably erroneous. But such failings attend judicial application of many legal criteria; and even if it is assumed that error is more common in the application of general than of precise criteria, it does not follow that all such criteria ought to be abandoned. In deciding whether real conflicts issues ought to be resolved by application of the suggested standard, the relevant question cannot be "Will such application resolve the issues infallibly?" Rather the question is "Which is the most satisfactory of alternative modes of resolution?"

I cannot accept Professor Currie's mode of resolution as a more satisfactory alternative. As has been noted elsewhere⁴⁵ and conceded by Currie,⁴⁶ it makes no provision for selection between the competing policies of other states by a forum having no interest of its own. A more fundamental objection is that which Currie and others have used to discredit the mechanical choice-of-law system expounded by Professor Beale⁴⁷ and the first *Restatement*:⁴⁸ Currie's system, like the *Restatement* system, will, in Currie's delightfully apt phraseology, "casually defeat now the one and now the other policy, depending upon a purely fortuitous circumstance."⁴⁹ Under Currie's proposal, the fortuitous circumstance is the act of forum selection by the plaintiff.⁵⁰ It is fortuitous because it has no greater normative content than the conceptual sign-

44. See text following note 12 *supra*.

45. Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 477-79 (1960).

46. Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258, 277-79 (1961).

47. BEALE, *CONFLICT OF LAWS* (1935).

48. *RESTATEMENT, CONFLICT OF LAWS* (1934).

49. Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 262 (1958).

50. See Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178; Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 245 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 10 (1958); Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 261-62 (1958).

posts of the *Restatement*. Indeed, with respect to real conflicts cases, the mechanical system of the *Restatement* must be preferred, for it affords the utility inherent in primary predictability and avoids the costs of predictable nonuniformity.

The comparative-impairment principle is advocated because, without sacrificing primary predictability, it invokes the normative criterion of implementing state policies. The principle seems to me vulnerable to attack only on the ground of uncertainty—that it is so vacuous in content and uncertain in application as to be inappropriate for adjudicative administration. Professor Currie seems to invoke a part of this uncertainty objection when he states that courts should not attempt to weigh the comparative external objectives because they are not equipped to discover the facts upon which resolution must turn.⁵¹ Neither this part of the objection, to which I first respond, nor the more general objection seems to me to be persuasive.

The desirability of basing rules of law on legislative facts that have been correctly ascertained is undeniable. Few would dispute the propriety of using, in the process of ascertainment, the best techniques afforded by the relevant social sciences. But, given the present state of those sciences, one who is prepared to deny to courts every rule of law the factual premises of which are not empirically demonstrable must content himself with a very sparse legal system. Some fundamental rules, such as the proposition that one who has deliberately and without justification caused physical harm to another shall pay compensation, might be accepted by such a Puritan without reference to legislative facts solely on the ground that they reflect deeply held and widely shared moral judgments of the community. But such rules are few in number and adequate to settle only a minute percentage of controversies. As soon as a case arises to which the application of the basic rule is doubtful, the hesitant and often inconsistent process of inclusion and exclusion must begin. Either to include or to exclude the doubtful case from the scope of the basic rule is to frame a new rule justifiable only by reference to legislative facts. The development of the law cannot long find sustenance in deeply held and widely shared value judgments of the community; both the in-

51. See Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176-77; Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258, 273 (1961).

tensity and the universality of community judgments disappear in the face of particularistic situations. Inclusion and exclusion will rest either on arbitrary doctrine or on assessments of longrun social benefits which will in turn rest on known or suspected but unknowable facts. The judge who declines to include because he is uncertain about the relevant data merely lays down a rule of exclusion that is quite as likely to be wrong. He cannot escape his dilemma by grumbling about the unavailability of techniques for ascertainment of fact or by deferring to a silent legislature.

The objection that courts are not equipped to discover the facts upon which resolution must turn is equally applicable to a very large percentage of our judge-made rules of law. That failure to deny an accusatory statement made in a man's presence is probative of his guilt, that the economic well-being of a community is impaired by prolonged suspension of the power of alienation, that a monopoly over a tying product is extended by a "tie-in" sale, that a jury can make a more reliable assessment of a nonhearsay than of a hearsay statement—these are but a few of many obvious examples of judicial factual assumptions that underlie well-known rules of law. The rules are only as sound as the unvalidated premises on which they rest, but they cannot be damned merely because empirical demonstration of the underlying hypotheses is beyond the ability of the court.

A broader statement of the uncertainty objection is a more persuasive criticism of my thesis than Currie's narrower argument. If pursuit of a goal is attended in a very high percentage of cases by difficult problems of judgment, pursuit is less attractive than if the problem were more tractable. Although the criticism has merit, I think it must be rejected. It loses most of its force unless it can be supported by an assertion that attainment of some other goal will be defeated by application of the principle. The only competing social goal is primary predictability. To one like Currie who suggests that forum law be applied in all real conflicts cases, it is enough to reply that his suggestion defeats that goal to a much greater extent. To one who urges adoption of a rigid and predictable system, *i.e.*, one that is arbitrary except as it serves the goal of primary predictability, response is more difficult and would involve repetition of all preceding pages. In its briefest form the response is that the comparative-impairment principle can be applied with conviction and predictability in a substantial majority of cases and

that the gains in effectuation of local policies will more than offset the costs incurred by marginal reduction of primary predictability.

Professor Currie's second reason why courts should not balance competing state interests in real conflicts cases is that to do so is to assume a "political function of a very high order. . . . a function which should not be committed to courts in a democracy."⁵² Perhaps this assertion rests on his usually tacit premise that balancing interests necessarily involves making super-value judgments.⁵³ A contrary view, that super-value judgments are separable from the comparative-impairment principle, is one of the cornerstones of this paper; and if Currie's second reason does depend on a premise of inseparability, I rest on my preceding argument.

Professor Currie's "political function" argument may be a corollary of his argument that courts are not equipped to ascertain necessary legislative facts; he may be saying that the legislative branch is better equipped, and therefore the matter should be left to them. This argument is irrelevant to the situation of a court required to decide cases not covered by legislative choice rules, the situation most frequent in this area. These cases must be decided, and they ought to be decided on the basis of the best assessment the court can make of comparative impairment.⁵⁴

III. ALLOCATION OF RESPONSIBILITY IN THE FEDERAL SYSTEM

A different and more soundly based sense of unease may underlie Professor Currie's disinclination to commit the balancing function to courts. As his own analysis effectively shows, the process of resolving choice cases is necessarily one of allocating spheres of legal control among states. His thesis, like mine, is that the process of allocation should not be performed unconsciously, that the private interests in choice cases are necessarily in balance, and that the cases can be decided by viewing them as instances of conflicting state interests rather than of conflicting private interests. Yet Currie, throughout his recent writings,⁵⁵ has assumed that state

52. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176.

53. See text accompanying notes 40-43 *supra*.

54. See text following note 50 *supra*.

55. In an early article Professor Currie took the position that federal courts should frame their own choice-of-law principles. Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 502-03 (1955). Thereafter he repented this view, Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 84 n.333 (1958), and still later rejected his initial position in

courts would be the tribunals with ultimate responsibility for the balancing process if, contrary to his view, that process occurred at all. That is a disquieting prospect. The courts of each state are active participants in the formulation and implementation of local policies. To place in their hands extensive responsibility for deciding when those policies will yield to and when they will prevail over the competing policies of sister states seems unsound. Baseball's place as the favorite American pastime would not long survive if the responsibilities of the umpire were transferred to the first team member who managed to rule on a disputed event. Responsibility for allocating spheres of legal control among member states of a federal system cannot sensibly be placed elsewhere than with the federal government.

None would dispute that the Constitution gives the federal government the power necessary to discharge the allocation function. The full-faith-and-credit clause of article IV both sets forth the cryptic substantive standard and expressly confers legislative power to implement it.⁵⁶ Congress exercised that power with respect to "Records and judicial Proceedings" in 1790,⁵⁷ and debate whether the constitutional clause was self-operative as to "public Acts" has been rendered moot by the 1948 revision of the Judicial Code which brought the implementing statute into verbal conformity with the constitutional grant.⁵⁸

The Supreme Court, in the exercise of its appellate supervision of state court proceedings, has articulated a reasonably coherent body of doctrine governing the respect to be given the judgments of sister states,⁵⁹ but neither the Court nor Congress has discharged the federal responsibility for allocation of spheres of legal control among the states.⁶⁰ The federal default is put in proper perspec-

some detail, Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960).

56. U.S. CONST. art. IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

57. Act of May 26, 1790, ch. 11, 1 Stat. 122 (now 28 U.S.C. § 1738 (1958)).

58. 28 U.S.C. § 1738 (1958).

59. See, e.g., *Hanson v. Denckla*, 357 U.S. 235 (1958); *Williams v. North Carolina*, 325 U.S. 226 (1945); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Williams v. North Carolina*, 317 U.S. 287 (1942); *Riley v. New York Trust Co.*, 315 U.S. 343 (1942); *Milliken v. Meyer*, 311 U.S. 457 (1940); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939) (federal interpleader following state adjudication); *Adam v. Saenger*, 303 U.S. 59 (1938); *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Huntington v. Attrill*, 146 U.S. 657 (1892). But cf. *Industrial Comm'n v. McCartin*, 330 U.S. 622 (1947).

60. For cases in which the Court might properly have assumed responsibility for allocation, see, e.g., *Carroll v. Lanza*, 349 U.S. 408 (1955); *Pacific Employers Ins. Co. v. In-*

tive when described as an abdication of a responsibility owed to the states. The justification for the cumbersome political arrangement known as federation is that certain problems are best handled at the local level because varying local circumstances may call for varying solutions and because varying attempts may reveal better solutions. The premise of state autonomy as to local problems presupposes that each state will be permitted to effectuate, to the extent consistent with the identical right of every other state, the policies it adopts. Those policies are as susceptible to frustration by sister states as by the central government. Yet, by the same document that embodies the full-faith-and-credit clause, the several states renounced freedom to engage in many activities by which sovereign countries negotiate or coerce respect for their individual policies.⁶¹ Had there been in the Constitution no express correlative assignment to the central government of responsibility to protect local policy from sister state impairment, the argument for an implied responsibility would have been strong. But the matter was not left to implication. In the first sentence of the first section of the first article following the description of the central govern-

dustrial Acc. Comm'n, 306 U.S. 493 (1939). Compare *Hanson v. Denckla*, 357 U.S. 235 (1958); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954).

Professor Currie would limit the role of the Court to policing those situations in which "one state has an interest in the application of its law and the other has none." Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 82 (1959); see Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 349 (1960). As stated in the text accompanying note 43 *supra*, he rejects judicial articulation of choice-of-law standards in real conflicts cases. See Currie, Book Review, 73 HARV. L. REV. 801, 803 (1960), and articles cited note 43 *supra*. This role is reserved, according to Professor Currie, to Congress. See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 43 (1959); Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 346 (1960). He summarized his thesis as follows: "Of course it would be quite impossible and undesirable for the Supreme Court to devise a comprehensive system of choice-of-law rules to be enforced on the basis of due process and full faith and credit, but so far as I know no responsible person now advocates such a scheme." Currie, Book Review, 73 HARV. L. REV. 801, 803 (1960). That such a scheme should be devised is a thesis of this Article.

61. "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal

"No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws

"No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. CONST. art. I, § 10.

"The judicial Power shall extend . . . to Controversies between two or more States" U.S. CONST. art. III, § 2.

"Full Faith and Credit shall be given . . . to the public Acts, Records and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

ment it was provided that each state *shall* accord "full faith and credit" to all of those means—"public Acts, Records, and judicial Proceedings"—by which states make their policies known.⁶²

Federal discharge of the responsibility imposed by that clause must be distinguished from other exercises of federal power. Congress, in a sense, provided a solution to many choice-of-law problems when it passed the Federal Employees Liability Act:⁶³ it displaced all manifestations of local policy regarding certain types of industrial injuries by national substantive law, occupying a field previously left to the states. Federal recognition of the responsibility assigned by the full-faith-and-credit clause, however, does not displace but rather shelters and implements the diverse local policies of states. No state policy or interest can be defeated by the clause except to vindicate a related interest of a sister state deemed by a neutral arbiter to be more vitally concerned with the case at hand.

In view of the frequency with which the federal government has been willing to displace state law with its own substantive policies, its reticence to exercise this more neutral power is paradoxical. The default is attributable to multiple causes. First, the evolution of choice-of-law doctrine in the United States had a late start. Secondly, the federal responsibility implicit in the full-faith-and-credit clause was partly discharged under the doctrine of *Swift v. Tyson*,⁶⁴ so that the consequences of total default were obscured until the early 1940's. Thirdly, accumulated hostility to the doctrine of *Swift v. Tyson* caused discharge of federal responsibility to be viewed in a distorted fashion. Each of these points deserves elaboration.

Half a century after the drafting of the Constitution, Mr. Justice Story was able to state, in the preface to the first edition of his work on conflict of laws, "There exists no treatise upon it in the

62. U.S. CONST. art. IV, § 1. (Emphasis added.) Although the word "shall" appeared in the comparable clause of the Articles of Confederation, ARTICLES OF CONFEDERATION art. IV, and in the clause as reported to the Convention by the Committee of Detail, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 188 (Farrand ed. 1911) [hereinafter cited as FARRAND], when the section was finally reported to the Convention by a special committee it read, "Full faith and credit ought to be given . . . , and the Legislature shall . . . prescribe . . . ," *id.* at 483-85. Subsequently, without recorded debate, "shall" was substituted for "ought to" in the first clause and "may" was substituted for "shall" in the second. *Id.* at 486.

The change suggests a purpose to strengthen and make self-operative the first clause and to remove from the second an unenforceable mandate to Congress.

63. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1958).

64. 41 U.S. (16 Pet.) 1 (1842).

English language; and not the slightest effort has been made, except by Mr. Chancellor Kent, to arrange in any general order even the more familiar maxims of the Common Law in regard to it."⁶⁵ Chancellor Kent's *Commentaries on American Law*, to which Story referred, contains only isolated references to choice rules scattered throughout the various lectures on substantive topics;⁶⁶ and the *Commentaries* themselves were published thirty-eight years after the date of the first Judiciary Act.⁶⁷ Therefore, Story's treatise in 1834 is generally regarded as the first English language source that contained a comprehensive exposition of choice-of-law problems.⁶⁸ In the light of this time sequence, it is not surprising that neither the Constitution nor the first Judiciary Act allocated in express terms responsibility for the articulation of choice-of-law criteria. However, sources contemporaneous with those documents demonstrate recognition of the problem.⁶⁹

When attention finally was devoted to choice criteria, American writers drew heavily on views that had developed in the context of the nationalistic and often hostile sovereignties of continental Europe.⁷⁰ Following Story's treatise in 1834, the subject seems to

65. STORY, COMMENTARIES ON THE CONFLICT OF LAWS xiii (5th ed. 1857).

66. See, for example, Chancellor Kent's discussion of the conflicts problems arising with reference to marriage, 2 KENT, COMMENTARIES ON AMERICAN LAW 78-80 (1st ed. 1827); divorce, *id.* at 89-101; contracts, 1 *id.* at 395-96 (1826); 2 *id.* at 324, 364 (1827); 3 *id.* at 48-49 (1828); the transfer of real property, 2 *id.* at 344 (1827); the distribution of personal property, *id.* at 58, 344-48; insolvency, *id.* at 329-32; and foreign judgments, *id.* at 101-03. Kent noted, even at that early date, that "the *conflictus legum* is the most perplexing and difficult title of any in the jurisprudence of public law." *Id.* at 93.

67. Ch. 20, 1 Stat. 73 (1789).

68. Story does refer, at several points, to British sources, *e.g.*, the contributions of William Burge, STORY, COMMENTARIES ON THE CONFLICT OF LAWS 617-23 (5th ed. 1857); John Erskine, *id.* at 839; and Lord Kaimes, *id.* at 839-40, 965-67.

The honor of the first American work on the subject belongs to Samuel Livermore's *DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS* (1828). See Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL. HIST. 230, 232 (1961).

69. See text accompanying notes 84-91, 103-45 *infra*.

70. Mr. Justice Story's analysis is based to a great extent on the works of continental writers. In the introduction to his treatise, he acknowledged his debt to the leading authors in the field: "In the preparation of these Commentaries I have availed myself chiefly of the writings of Rodenburg, the Voets (father and son), Burgundus, Du Moulin (Molinaeus), Froland, Boullenois, Bouhier, and Huberus, as embracing the most satisfactory illustrations of the leading doctrines." STORY, COMMENTARIES ON THE CONFLICT OF LAWS 14 n.1 (5th ed. 1857). All but six of the forty-seven names noted in Story's list of authors cited are continental Europeans. *Id.* at xix-xxii. This reliance on continental theorists is reflected in his judicial opinions as well. See, *e.g.*, *Le Roy v. Crowninshield*, 15 Fed. Cas. 362 (No. 8269) (C.C.D. Mass. 1820); *Harvey v. Richards*, 11 Fed. Cas. 746 (No. 6184) (C.C.D. Mass. 1818); *Van Reimsdyck v. Kane*, 28 Fed. Cas. 1062 (No. 16871) (C.C.D.R.I. 1812). See generally Nadelmann, *supra* note 68. For a further illustration of the point in text, see *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 359-60 (1827) (opinion of Johnson, J.), which also refers to the close relationship between conflict of laws and the diversity grant. Mr. Justice Johnson, in his opinion for the Court, stated, "[The diversity jurisdiction]

have received very little comprehensive consideration for many years.⁷¹ From these roots, there grew in the present century the rigid and arbitrary system that is encapsulated in the *Restatement*. For present purposes the most significant aspect of this system is its focus on private rights. Accommodation and implementation of state policies were ignored except to the marginal degree that they shaped the related doctrines governing jurisdiction of courts and the public policy exception to general choice rules.

Despite the tardy evolution and the private-right orientation of choice-of-law doctrines, both of which tended to obscure federal responsibility, the federal courts partly discharged that responsibility by the exercise of independent judgment on choice questions until a recent date. The sharply defined division between state and federal law to which we have become accustomed, especially since *Erie R.R. v. Tompkins*,⁷² was unknown in the early jurisprudence of the country. Even in cases wholly internal to a single state, the early reports exhibit a broad view of the federal courts' function in interpreting state law.⁷³ Whether the federal courts were free to adopt their own interpretations of state statutes was unclear until 1825, when Mr. Chief Justice Marshall in *Elmendorf v. Taylor*⁷⁴ announced that state court interpretations of state statutes were to be accepted by the federal courts. In 1832 the limitation was underscored when the Supreme Court, in *Green v. Neal's Lessee*,⁷⁵ bowed to a state court interpretation of a statute

had for its object [among others] . . . to obviate that *conflictus legum*, which has employed the pens of Huberus and various others" *Id.* at 359.

71. The next work of comparable significance in the United States was WHARTON, *CONFLICT OF LAWS* (1st ed. 1872).

72. 304 U.S. 64 (1938).

73. In two early cases the Court followed state law without explaining its reasons. In *Brown v. Van Braam*, 3 U.S. (3 Dall.) 344, 355 (1797), the Court affirmed the lower court's decision "under the laws, and the practical construction of the courts of Rhode Island" In *Irvine v. Sims's Lessee*, 3 U.S. (3 Dall.) 425 (1799), an action of ejectment, the Court held that the plaintiff had a good title by state law and could sue at law instead of equity. Compare the differing analyses of these two cases in Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 88 n.85 (1923), and in 2 CROSSKEY, *POLITICS AND THE CONSTITUTION* 822-29 (1953). In *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212 (1818), a case almost identical to *Irvine v. Sims's Lessee*, the Court appeared to reverse its position, looking to the general common law to determine whether a defense raised was good in an action at law.

74. 23 U.S. (10 Wheat.) 152, 159-60 (1825): "This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. . . . We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. . . . [O]n the same principle, the construction given by the courts of the several States to the legislative acts of those States, is received as true, unless they come in conflict with the constitution, laws or treaties of the United States."

75. 31 U.S. (6 Pet.) 291 (1832).

that the Supreme Court on two earlier occasions⁷⁶ had interpreted differently. Both *Elmendorf* and *Green* involved real property, about which the Court had exhibited the greatest degree of deference to state interpretation before 1825; and the two cases could have been limited thereafter by distinguishing cases involving statutes affecting "the general common law."⁷⁷ No such limitation emerged however, and *Elmendorf* and *Green* were interpreted to embrace all state statutes.

Uncertainty regarding the significance of state decisional law, even in property matters, continued until 1827 when, in *Jackson v. Chew*,⁷⁸ the Court emphasized "the rule . . . that where any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court . . .,"⁷⁹ expressly rejecting the argument that "this principle [applies] only to state constructions of their own statutes."⁸⁰ Federal court deference to state decisional law was confined to the rule stated in *Jackson v. Chew*. Although a Supreme Court decision in 1834, *Wheaton v. Peters*,⁸¹ appears to lay down a broader requirement that state decisions be followed, the case should not be so interpreted. It involved common-law copyrights, a novel field of law in 1834. Mr. Justice McLean, speaking for the Court, said

It is clear, there can be no common law of the United States. The federal government is composed of . . . independent States; each of which may have its . . . common law. There is no principle which pervades the Union, and has the authority of law

When, therefore, a common law right is asserted, we must look to the State in which the controversy originated. And in the case under consideration, as the copyright was entered in the clerk's office of the district court of Pennsylvania . . . and . . . [the books were] published in that State, we may inquire, whether the common law, as to copyrights . . . was adopted in Pennsylvania.⁸²

76. *Powell's Lessee v. Harman*, 27 U.S. (2 Pet.) 241 (1829); *Patton's Lessee v. Easton*, 14 U.S. (1 Wheat.) 476 (1816).

77. In *Green* itself Mr. Justice McLean spoke in general terms of the need for the federal courts to follow local law but emphasized the significance of property rules: "Here is a judicial conflict arising from two rules of property in the same State, and the consequences are not only deeply injurious to the citizens of the State, but calculated to engender the most lasting discontents. It is therefore essential to the interests of the country, and to the harmony of the judicial action of the federal and state governments, that there should be but one rule of property in a State." *Green v. Neal's Lessee*, 31 U.S. (6 Pet.) 291, 300 (1832).

78. 25 U.S. (12 Wheat.) 153 (1827).

79. *Id.* at 162.

80. *Id.* at 167.

81. 33 U.S. (8 Pet.) 591 (1834).

82. *Id.* at 658.

The area of law being comparatively new, there was a question whether Pennsylvania had adopted the corpus of the common law regarding copyrights, and to answer that question, McLean was prepared to look to Pennsylvania decisions. His language should not be read to mean that he would have felt bound by particular state holdings regarding the content of that body of law. This interpretation of McLean's language is forcefully borne out by his subsequent opinions on circuit reiterating the proposition that the federal courts were free to adopt their own view of the content of general common law as distinguished from the question of its adoption. For example, in 1840 he refused to follow an Ohio decision on suretyship stating that "this decision rests upon general principles, and not upon the construction of a statute . . . [which] would, under our practice, constitute a rule of decision for this court."⁸³

Consequently the decision in *Swift v. Tyson*⁸⁴ in 1842 must be viewed, not as the institution of a new distribution of judicial responsibilities, but as the culminating articulation of a distribution toward which the Court had moved cautiously since its founding.

In this historical setting, it is not surprising that the Court exercised an equally expansive role with respect to choice-of-law issues. Both before⁸⁵ and after⁸⁶ *Swift v. Tyson* the federal courts exercised independent judgment on choice of law. Choice rules were re-

83. *Findlay's Ex'rs v. Bank of the United States*, 9 Fed. Cas. 62, 65 (No. 4791) (C.C.D. Ohio 1839). For other decisions by Mr. Justice McLean which were decided on the basis of "general principles," see *Austen v. Miller*, 2 Fed. Cas. 229, 230 (No. 661) (C.C.D. Ohio 1850); *Riley v. Anderson*, 20 Fed. Cas. 801, 802 (No. 11835) (C.C.D. Ohio 1841); *McKinney v. Neil*, 16 Fed. Cas. 219 (No. 8865) (C.C.D. Ohio 1840). In *McKinney v. Neil* McLean refused to follow an Ohio opinion on the admissibility of evidence, stating, "In the construction of [state] . . . statutes . . . this court follow [*sic*] the same rule of decision as the supreme court of the state. But in all other questions the court will look to the decisions of the state, as the decisions of other courts, and not as establishing the law." *Id.* at 222.

84. 41 U.S. (16 Pet.) 1 (1842).

85. See, e.g., *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827); *De Wolf v. Johnson*, 23 U.S. (10 Wheat.) 367 (1825); *M'Millan v. McNeill*, 17 U.S. (4 Wheat.) 209 (1819); *Van Reimsdyck v. Kane*, 28 Fed. Cas. 1067 (No. 16872) (C.C.D.R.I. 1812).

86. See, e.g., *Scudder v. Union Nat'l Bank*, 91 U.S. 406 (1875); *Tilden v. Blair*, 88 U.S. (21 Wall.) 241 (1874); *Cook v. Moffat*, 46 U.S. (5 How.) 295 (1846); *Keeler v. Goodman*, 296 Fed. 909 (5th Cir. 1924); *Greaves v. Neal*, 57 Fed. 816 (C.C.D. Mass. 1893); *Ex parte Heidelberg*, 11 Fed. Cas. 1021 (No. 6322) (C.C.D. Mass. 1876).

At times the federal courts have used—perhaps misused—other constitutional clauses to accomplish choice-of-law objectives. Initially the contracts clause and later the due process clause of the fourteenth amendment were invoked to hold invalid, as applied to multistate situations, state provisions that were quite unobjectionable in their local applications. See, e.g., *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934) (due process clause); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918) (due process clause); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (contracts clause); *M'Millan v. McNeill*, 17 U.S. (4 Wheat.) 209 (1819) (by implication) (contracts clause).

garded not merely as general rather than local law but as part of a still more august and transcendent body of principle, the law of nations. The point was made elaborately by Mr. Justice Story in *Harvey v. Richards*,⁸⁷ while the case involved foreign as well as interstate elements, Story's language shows that this was not controlling:

I feel myself compelled, therefore . . . to admit, that by the law of Massachusetts the probate courts have no jurisdiction . . . to compel a final . . . distribution of the estate of a foreigner . . . under . . . "ancillary" . . . administration. And if this were a case depending on the local law of the state . . . I should not scruple to adopt it . . . But the case here does not depend upon the local law. . . . [T]he question . . . is properly [one] . . . of international law, dependent upon no local usages, but resting on general principles. The parties are citizens of different states, and their rights must be decided, not merely by the authority of one state, but by principles applicable to all states.⁸⁸

Story made the point again in *Le Roy v. Crowninshield*,⁸⁹ a case involving the availability of the New York statute of limitations in a suit on a New York contract in a Massachusetts forum. Story argued that the defense ought to be good but cited the works of a number of European writers and of Kaimes, the Scottish jurist, to the contrary. He then said,

But I do not sit here to consider, what in theory ought to be the true doctrines

It does appear . . . that the question . . . has been settled . . . by authorities, which the court is bound to respect. . . . Besides the incidental recognitions already referred to in other writers, Huberus and Voet speak strongly on the point. . . . Lord Kaimes, as we have already seen, asserts the doctrine. . . . We may now look to the . . . common law. In the case of *Williams v. Jones* . . . Lord Ellenborough . . . [states that the foreign statute could not be relied upon] and puts an end to the question, at least in England.⁹⁰

Only after Story thus canvassed the international writings did he turn to decisions of New York and Massachusetts. Story cited in subsequent paragraphs decisions in point, also contrary to his personal view, from the highest courts of both states involved. But, significantly, it was the foreign authorities he said "the court is bound to respect."

87. 11 Fed. Cas. 746 (No. 6184) (C.C.D. Mass. 1818).

88. *Id.* at 759.

89. 15 Fed. Cas. 362 (No. 8269) (C.C.D. Mass. 1820).

90. *Id.* at 371-72.

Again, in *Wheaton v. Peters*, Mr. Justice McLean made clear why Pennsylvania's, rather than some other state's, adoption of the common law of copyrights was relevant: "[W]e must look to the State *in which the controversy originated*. And in the case under consideration, *as the . . . book . . . was published in that State [Pennsylvania]*, we may inquire, whether the common law, as to copyrights . . . was adopted in Pennsylvania."⁹¹ One hundred six years later and two years after *Erie R.R. v. Tompkins*, Mr. Justice Roberts was able to say, "[I]f the right . . . is one of substantive law, the Rules of Decision Act required the District Court, though sitting in Illinois, to apply the law of Indiana, the state where the cause of action arose."⁹² It is clear, then, that from the founding of the federal government through the decision in *Erie R.R. v. Tompkins* the federal courts exercised independent judgment on choice rules.

Notwithstanding federal-court administration, choice doctrine retained the private-right veneer with which it had become encumbered and thus failed to exhibit the characteristics that made federal administration manifestly appropriate. Choice problems were hardly distinguishable from other matters of "general common law" as to which, under *Swift v. Tyson*, the federal courts exercised independent judgment. Dissatisfaction with this misallocation of responsibility was intense⁹³ and, together with political objections to certain federal substantive doctrines,⁹⁴ led to broad

91. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834). (Emphasis added.)

92. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10-11 (1941). (Footnote omitted.)

93. See, e.g., the dissents by Mr. Justice Holmes in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532 (1928), and *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370 (1910); and by Justice Field in *Baltimore & O.R.R. v. Baugh*, 149 U.S. 368, 391 (1893). For attacks by commentators on the doctrine of *Swift v. Tyson* after *Black & White Taxicab* see Dobie, *Seven Implications of Swift v. Tyson*, 16 VA. L. REV. 225 (1930); Johnson, *State Law and the Federal Courts*, 17 KY. L.J. 355 (1929); Note, *Swift v. Tyson and the Construction of State Statutes*, 41 W. VA. L.Q. 131 (1935).

94. The most violent attacks on the role of the federal courts in diversity cases were directed at the use of the injunction in labor cases. In FRANKFURTER & GREENE, *THE LABOR INJUNCTION* 210 (1930), it is estimated that about two-thirds of all labor cases in the courts were brought in federal courts under the diversity jurisdiction. Further, bias of the federal courts toward employer requests in the period 1901-1928 is evidenced by the following figures: of 71 applications for restraining orders, 70 were granted; of 103 requests for temporary injunctions, 88 were granted; and of 33 applications for final injunctions, 30 were granted. *Id.*, app. II, at 247. See also *id.* at 5-17, 49 nn.7-8.

Adverse congressional reaction was reflected in proposed legislation restricting the use of injunctions in diversity cases. See S. 1482, 70th Cong., 1st Sess. (1928); *Hearings on S. 1482 Before a Subcommittee of the Committee on the Judiciary, U.S. Senate*, 70th Cong., 1st Sess., pts. 1-5 (1928).

Labor vigorously opposed the nomination of Judge John J. Parker of the Fourth Circuit to the Supreme Court because of his "anti-labor" opinion in *International Organiza-*

attacks on diversity jurisdiction.⁹⁵ Rhetorically, the error of *Swift* is portrayed most vividly by asserting that the accident of diversity of citizenship does not justify differences in results reached by courts just across the street from each other; beside such word pictures, talk of appropriateness in a federal arrangement seems abstruse and theoretical. The erroneous allocation of power imposed by *Swift* was corrected in *Erie*, and the stage was set for an erroneous allocation soon to be imposed.

In *Klaxon Co. v. Stentor Elec. Mfg. Co.*⁹⁶ the Supreme Court held that a federal district court, when enforcing state-created rights, must make initial reference to the whole law of the state in which the court is physically located. It so held without making the most cursory reference to the language, history, or purpose of the Rules of Decision Act or the grant of diversity jurisdiction or to the history or purpose of the federal courts in general. It so held because "Otherwise, the accident of diversity of citizenship . . . [might lead to different results] in . . . state and federal courts sitting side by side."⁹⁷ In its zeal to achieve uniformity, the Court did not overlook the obvious fact that parity between disparate *A* and *B* can be achieved by altering *B* as easily as by altering *A*. Before holding that the federal court sitting in Delaware had to mimic Delaware state courts if those courts would subordinate New York to Delaware interests, the Supreme Court did consider whether prior interpretations of the full-faith-and-credit clause left Delaware free to do so; it concluded that the cases did not impose on Delaware a mandatory choice rule in favor of New York.

For present purposes it will be assumed that the Court logically followed earlier full-faith-and-credit cases in *Klaxon*; the important question is whether those prior holdings should have been

tion of *United Mine Workers v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839, *cert. denied*, 275 U.S. 536 (1927). See *Hearing on the Confirmation of Hon. John J. Parker To Be an Associate Justice of the Supreme Court of the United States Before a Subcommittee of the Senate Committee on the Judiciary*, 71st Cong., 2d Sess. 23-60 (1930). On May 7, 1930, Parker's nomination was rejected by the Senate 41-39. 72 CONG. REC. 8487 (1930).

See also Judge Parker's defense of the diversity jurisdiction. Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A.J. 433 (1932).

95. See Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356 (1933); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928). During the height of agitation bills were introduced in Congress to abolish diversity jurisdiction. E.g., S. 939, 72d Cong., 1st Sess. (1932), see *Hearings on S. 937, S. 939, & S. 3243 Before a Subcommittee of the Senate Committee on the Judiciary, United States Senate*, 72d Cong., 1st Sess. (1932); S. 4357, 71st Cong., 2d Sess. (1930), see S. Rep. No. 691, 71st Cong., 2d Sess. (1930); S. 3151, 70th Cong., 1st Sess. (1928), see S. Rep. No. 626, 70th Cong., 1st Sess. (1928).

96. 313 U.S. 487 (1941).

97. *Id.* at 496.

permitted to stand. In my view, they should not. At least after *Erie*, the full-faith-and-credit clause should have been interpreted to dictate the initial⁹⁸ choice-of-law reference in every case, whether in a state or federal court. That conclusion, in my view, is compelled by the combination of factors that have been discussed with another that remains to be presented. Choice cases cannot be resolved on the basis of private interests except by super-value judgments. Regardless of the criteria used to decide choice cases, the inevitable result of their resolution is an allocation of spheres of legal control. Governmental interests can be identified in choice cases, and the unavoidable allocation of spheres of control ought to be made as those interests dictate by applying the principle of comparative impairment. The process of allocation ought to be committed to the federal government; for the alternative is to place that responsibility, not in the hands of the states, but *ad hoc* in the hands now of this state, now of that, as determined by promptitude of private party action and the expanding limits of service of process. Finally, the history of the diversity clause, the full-faith-and-credit clause, and the Rules of Decision Act reveals a purpose to lodge responsibility in the federal courts. For that history, I turn briefly to judicial administration and then, in more detail, to the circumstance of enactment.

The significance of judicial administration prior to *Klaxon* is ambivalent. The full-faith-and-credit clause has never been interpreted as a self-operative source of mandatory choice rules. It is equally true however that the asserted federal responsibility was largely fulfilled by the federal courts, until the *Klaxon* decision, through diversity jurisdiction. Responsibility would have been totally discharged if federal-court choice rules had been regarded as "federal law" within the supremacy clause, but that they were not so regarded is understandable. The federal courts exercised independent judgment during this period in many fields of law which it is now generally agreed should have been left to the states. This overly broad role assumed by the federal courts, together with the private-right orientation of prevailing choice rules, blocked the emergence of a distinction between choice criteria and the general common law. Federal court pronouncements on general common law were not deemed federal law under the supremacy clause;

98. The significance of the word "initial" will be explained in text accompanying note 144 *infra*.

state courts were to be guided rather than herded down the path of infinite wisdom. That state courts would occasionally stray from the path was assumed by the jurisprudential context. A federal judiciary that could embrace this view of the general common law could see no need for greater compulsion with respect to choice criteria, and a federal judiciary that had not perceived the relationships that necessitated *Erie* would find it difficult to justify reverse-*Erie*.

Developments in the field of admiralty illustrate this point. Maritime law was unequivocally committed to the administration of the federal judiciary.⁹⁹ The reverse-*Erie* doctrine finally emerged in maritime law under the label "national uniformity,"¹⁰⁰ but only after the passage of a century;¹⁰¹ and even after announcement of the doctrine, it endured an uncertain and unrespected existence¹⁰² until it received jurisprudential support and a different name from the decision in *Erie R.R. v. Tompkins*.¹⁰³ On the basis of judicial precedents, then, the following, but no stronger, assertion is warranted: the *Klaxon* issue, long occluded by *Swift v. Tyson*, was thrust forward for resolution by *Erie*, and prior precedents no more compelled the *Klaxon* result than the resolution urged by this paper.

The history of the adoption of the relevant clauses is more favorable to the thesis of this paper than to the *Klaxon* result. That the diversity clause was intended to have the trivial function left to it today is belied by many documents pertaining to the Constitutional Convention.

In April 1787 Madison, in anticipation of the Convention to which he had been named a delegate, wrote a memorandum out-

99. U.S. CONST. art. III, § 2; Judiciary Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77 (now 28 U.S.C. 1333 (1958)).

100. *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917); *cf.* *The Roanoke*, 189 U.S. 185 (1903); *Workman v. New York City*, 179 U.S. 552 (1900); *City of Norwalk*, 55 Fed. 98 (S.D.N.Y. 1893).

101. Compare the Court's treatment in *Belden v. Chase*, 150 U.S. 674 (1893), of the judicial rule regarding division of damages with its treatment of the legislative rules regarding running lights.

102. With the cases cited note 103 *infra* compare *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924); *State Industrial Comm'n v. Nordenholt Corp.*, 259 U.S. 263 (1922), both distinguishing *Southern Pac. Co. v. Jensen* on doubtful grounds. As recently as 1948 Judge Learned Hand said, "The Supreme Court . . . continued to recognize [*Jensen*] . . . only with mounting reluctance . . ." *Guerrini v. United States*, 167 F.2d 352 (2d Cir. 1948). See also GILMORE & BLACK, ADMIRALTY 43-46, 374-86 (1957).

103. For illustrations of the renewed vigor of the admiralty doctrine after *Erie* see, e.g., *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). Compare *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

lining major defects in the Articles of Confederation.¹⁰⁴ Under the fourth major heading of the paper, "Trespasses of the States on the rights of each other,"¹⁰⁵ he wrote:

These [trespasses] are alarming symptoms See the law of . . . Maryland in favor of vessels belonging to her *own citizens*—of N. York in favor of the same—

Paper money, installments of debts, occlusion of Courts . . . may likewise be deemed aggressions on the rights of other States. As the Citizens of every State aggregately taken stand more or less in the relation of Creditors or debtors, to the Citizens of every other State, Acts of the debtor State in favor of debtors, affect the Creditor State, in the same manner as they do its own citizens who are relatively creditors toward other citizens. . . . If the exclusive regulation of the value . . . of coin was properly delegated to the federal authority, the policy of it equally requires a controul on the States in the cases above mentioned.¹⁰⁶

In the same month he wrote to Edmund Randolph regarding proposed contents of the new Constitution.¹⁰⁷ He mentioned representation in Congress, the commerce power, a national veto on state law, and fourthly, a federal judiciary:

If the Judges . . . are bound by their oaths to [the states] . . . and not to the Union . . . the interests of the nation may be defeated It seems at least essential that an appeal should lie to some national tribunal in all cases which concern foreigners, or inhabitants of other States.¹⁰⁸

The following month Madison met with other Virginia delegates to the Convention in Philadelphia, and they drafted the "Virginia," or "Large State," Plan, which was a recasting of Madison's April letters to Randolph and Washington.¹⁰⁹ Of the various party

104. *Vices of the Political System of the U. States*, 2 THE WRITINGS OF JAMES MADISON 361-69 (Hunt ed. 1901).

105. The first three headings were "Failure of the States to comply with the Constitutional requisitions," "Encroachments by the States on the federal authority," and "Violations of the Law of nations and of treaties." *Id.* at 361-62.

106. *Id.* at 362.

107. Letter From James Madison to Edmund Randolph, April 8, 1787, in *id.* at 336-40.

108. *Id.* at 339. See also Madison's letter to George Washington dated April 16, 1787, eight days after the Randolph letter and similar in its general content and substantially identical as to the diversity grant. *Id.* at 344-52.

The primacy assigned by Madison in these private letters to the diversity grant is in marked contrast with his tepid public defense of the clause at the Virginia ratification debates, see note 118 *infra*, and it corroborates the suggestion of Professors Jaffin and Yntema that Madison's comments at the debates were influenced more by political considerations than by personal belief. Jaffin & Yntema, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 875-76 n.12 (1931). Brant states that Madison was ill during the debates and avoided participation to the extent he could. BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 1787-1800, at 219-21 (1950).

109. Comparison of the substance of the documents is the best evidence. See also BRANT, *op. cit. supra* note 108, at 23-24.

heads of jurisdiction, diversity was the only one expressly set forth in the Plan,¹¹⁰ the basic document around which the Constitution was fashioned. At one point the judiciary clause was amended to leave the diversity grant as well as all other party grants implicit in the general phrase, "questions which involve the national peace and harmony."¹¹¹ But the diversity grant was the first to be stated in express form by the Committee of Detail;¹¹² and that grant, as well as a number of other party grants, appeared in the draft reported to the Convention by the Committee¹¹³ and remained in the judiciary clause thereafter. Few comments appear in the records of the Convention regarding the purpose of the grant but one illuminating comment was made during consideration of the contract clause.¹¹⁴ A motion was made to forbid the states "to interfere in private contracts."¹¹⁵ Gouverneur Morris of Pennsylvania replied, "This would be going too far. There are a thousand laws relating to bringing action . . . The Judicial power of the U—S— will be a protection in cases within their jurisdiction; and *within the State itself* a majority must rule, whatever may be the mischief done *among themselves*."¹¹⁶

The diversity grant received more explicit attention during the ratification debates. While discussion of the grant's purpose tended

110. *Resolutions Offered by Mr. Edmund Randolph to the Convention, May 29, 1787*, in 1 ELLIOT, *DEBATES ON THE FEDERAL CONSTITUTION* 143, 144 (2d ed. 1863) [hereinafter cited as ELLIOT], 1 FARRAND 20, 21-22. Such other "party" grants Randolph may have contemplated were left implicit in the general phrase "questions which involve the national peace or harmony." *Ibid.* No "party" clauses except "cases . . . affecting ambassadors" appeared in the original Pinckney draft. *Mr. Charles Pinckney's Draft of a Federal Government*, art. IX, May 29, 1787, in 1 ELLIOT 145, 149, 3 FARRAND 595, 600. The Patterson, or Small State, Plan, introduced some weeks later, mentioned cases affecting "foreigners" as well as ambassadors. *Propositions Offered to the Convention by the Hon. Mr. Patterson*, June 15, 1787, No. 5, in 1 ELLIOT 175, 176, 1 FARRAND 242, 244.

111. 1 ELLIOT 174, 1 FARRAND 232. That the diversity clause was viewed as one involving the "national peace and harmony" is also borne out by one of a series of letters, signed "The Landholder," which appeared in *The Connecticut Courant* and advocated ratification of the Constitution. This series of letters is generally attributed to Oliver Ellsworth. See FORD, *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 1787-1788*, at 137 (1892). Ellsworth was a delegate to the Convention and a member of the Committee of Detail. See 2 FARRAND 106.

The Landholder VI, printed in the *Courant*, December 10, 1787, as quoted in FORD, *op. cit. supra* at 162, 164, stated: "[The judiciary] extends only to objects and cases specified, and wherein the national peace or rights, or the harmony of the states is concerned, and not to controversies between citizens of the same state (except where they claim under grants of different states)."

112. See 2 FARRAND 147.

113. See *Draft of a Constitution, Reported by the Committee of Five*, August 6, 1787, art. XI, § 3, in 1 ELLIOT 224, 229, 2 FARRAND 177, 186.

114. U.S. CONST. art. I, § 10.

115. 2 FARRAND 439.

116. *Ibid.* (Emphasis added.) The clear implication is that state rules that might validly be applied in cases between citizens of the enacting state would not necessarily be applied in cases in the federal courts.

to be submerged in fierce debate over jury trial, expense, and inconvenience to litigants,¹¹⁷ a number of speakers referred to it. While some contented themselves with imprecise reference to the possibility of prejudice,¹¹⁸ others made clear that the kind of prejudice to be avoided was the application, in cases involving noncitizens of the forum, of rules of law of the forum.

During the Pennsylvania debates James Wilson, a delegate to the Convention¹¹⁹ and a member of the Committee of Detail,¹²⁰ defended the diversity grant:

I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island. I ask, further, How will a creditor feel who has his debts at the mercy of tender laws in other states? It is true that, under this Constitution, these particular inequities may be restrained in future; but . . . there are other ways of avoiding payment of debts. There have been instalment acts, and other acts of a similar effect. Such things . . . destroy the very sources of credit. . . .

. . . Merchants . . . will tell you that they cannot trust their property to the laws of the state in which their correspondents live.¹²¹

Mr. William R. Davie, also a delegate at the Convention,¹²² spoke of the jurisdictional grant at the North Carolina debates:

Is it probable, if a citizen of South Carolina owed a sum of money to a citizen of this state, that the latter would be certain of recovering the full value in their courts? That state might in future [*sic*], as they have already done, make pine-barren acts to discharge their debts. . . . They might pass the most iniquitous instalment laws, procrastinating the payment of debts due from their citizens, for years—nay, for ages. Is it probable that we should get justice from their own judiciary, who might consider themselves obliged to obey the laws of their own state? . . .¹²³

117. See 2 ELLIOT 109–13, 488–94; 3 *id.* 521–30, 539–46; 4 *id.* 142–52.

118. For example, "It may happen that a strong prejudice may arise, in some states, against the citizens of others." Madison, in 3 *id.* 533.

119. 1 FARRAND 1.

120. 2 FARRAND 97.

121. *The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution*, in 2 ELLIOT 415, 491–92. Wilson also indicated the relationship in the minds of the framers between the diversity and other party grants in article III and the law of nations: "[T]he objects of the judicial department . . . extend beyond the bounds of any particular state; but further, a great number of the civil cases there enumerated depend either upon the law of nations, or the marine law." *Id.* at 516.

122. 1 FARRAND 1.

123. *Debates in the Convention of the State of North Carolina on the Adoption of the Federal Constitution*, in 4 ELLIOT 1, 157. This passage appears in the middle of a paragraph two pages in length, beginning and ending with a reference to the "arising under" grant. The quoted passage is not expressly stated to relate to the diversity grant, but its contents appear to relate to that grant. Two pages later Mr. Davie again mentions installment laws, as quoted above, with express reference to diversity.

The security of impartiality is the principle [*sic*] reason for giving up the ultimate decision of controversies between citizens of different states. It is essential to . . . agriculture and commerce that the hands of the states should be bound from making paper money, instalment laws, or *pine-barren acts*. . . . [I]n the federal court, real money will be recovered with that speed which is necessary to accommodate the circumstances of individuals.¹²⁴

In the Virginia debates Edmund Pendleton, President of the Virginia convention, referred to the diversity grant:

I think, in general, those decisions might be left to the state tribunals. . . . But may no case happen in which it may be proper to give the federal courts jurisdiction in such a dispute? Suppose a bond given by a citizen of Rhode Island to one of our citizens. The regulations of that state being unfavorable to the claims of the other states, if he is obliged to go to Rhode Island to recover it, he will be obliged to accept payment for one third, or less, of his money. . . . Is it just that a man should run the risk of losing nine tenths of his claim? Ought he not to be able to carry it to that court where unworthy principles do not prevail?¹²⁵

Not only the formal ratification debates but the debates in the public press afford evidence that the local prejudice at which the diversity grant was aimed included the imposition of local laws. The anti-federalist *Letters of Agrippa*, published in the *Massachusetts Gazette*, traversed the point in the course of predicting, accurately, the *Swift v. Tyson* development and, inaccurately, other federal encroachments:

Causes . . . between citizens of different states . . . are to be tried before a continental court. This court is not bound to try it according to the local laws where the controversies happen; for in that case it may as well be tried in a state court. The rule which is to govern . . . must, therefore, be made by the court itself . . . or by . . . Congress. . . . The Congress, therefore, have the right to make rules for trying all kinds of questions relating to property between citizens of different states. . . . [A]nd . . . judges in the . . . states shall be bound thereby. . . .¹²⁶

124. *Id.* at 159.

125. *The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution*, in 3 ELLIOT 1, 549. Patrick Henry asked, "[B]y what law are they [diversity cases] to be tried?" *Id.* at 542. John Marshall replied: "By the laws of the state where the contract was made. According to those laws, and those only, can it be decided." *Id.* at 556. Marshall's comment, unlike Pendleton's, does not expressly indicate that the federal courts were expected to reject "unworthy" rules of decision theretofore used by state courts; but the exchange shows awareness of the close relation between the diversity clause and choice of law.

126. Letter of Dec. 11, 1787 (Agrippa V), in FORD, *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES*, at 66-67 (1892).

It is vain to tell us, that a maxim of the common law requires contracts to be determined by the law existing where the contract was made: for it is also a maxim, that the legislature has a right to alter the common law.¹²⁷

If history spoke less clearly, if it told us only that the purpose of diversity was to avoid prejudice stemming from provincialism, one would nevertheless be driven to the same conclusion. Such prejudice might affect the fact-finding process by local juries, but local juries have traditionally been used in federal courts; assembly of national juries is barely conceivable today and certainly was not contemplated in 1787. Local prejudice might affect the fact-finding process or the tone of jury instructions by local judges, but federal trial court judges have always been selected from the state in which the court sits;¹²⁸ a different practice might conceivably have been contemplated, but actual practice rebuts the speculation. Local prejudice might inhere in local procedural rules, but the first Congress directed federal courts to follow the procedures of the state in which they sat.¹²⁹ Thus practices adopted by the men who drafted the Constitution show that the diversity forum was not intended to substitute a national for any of these local elements of judicial administration. The only significant element of judicial administration that remains is legal doctrine. The exercise of independent judgment by federal judges on choice rules confirms that legal doctrine was the element intended to distinguish federal from state tribunals.

The few fragments in the records of the Constitutional Convention relating to the full-faith-and-credit clause suggest that it was intended to embody choice of law as a federal function. As

127. Letter of Dec. 14, 1787 (Agrippa VI), in *id.* at 69. Authorship of the *Letters of Agrippa* was generally attributed to James Winthrop, of Cambridge, Mass. See *id.* at 51-52.

128. The practice of selecting federal district judges from the states in which they are to sit began with Washington's first twenty-six appointments, listed in Surrency, *The First Judges of the Federal Courts*, 1 AM. J. LEGAL HIST. 76, 78 (1957). Of the twenty-two with entries in the BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774-1961 (1961) and the DICTIONARY OF AMERICAN BIOGRAPHY (1957 ed.), all without exception were prominent residents of their states prior to their selection. The tradition is as compelling today as it was in Washington's time; of President Kennedy's forty-six nominations for district judgeships in 1962, all except one—a commuter from Darien, Connecticut, appointed to the Southern District of New York—are residents of the states in which their district is located. 18 CONG. Q. ALMANAC 931-32 (1962); cf. VANDERBILT, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION 38-39 (1956); Sears, *The Appointment of Federal District Judges*, 25 ILL. L. REV. 54 (1930); Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 487-88 (1930).

129. Act of Sept. 29, 1789, § 2, 1 Stat. 93. For a discussion of the interpretation of this act and its successors, see HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 581-89 (1953).

reported to the Convention by the Committee of Detail, the clause was worded essentially as it had been in the Articles of Confederation:¹³⁰ "Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates of every other State."¹³¹ After discussion of the need for an additional clause empowering Congress to implement the quoted provision,¹³² both that clause and two resolutions regarding implementation were referred to a special committee for further work.¹³³ Governor Randolph of Virginia, who opposed a broad grant of implementing power to Congress,¹³⁴ moved the first of the resolutions which read,

Whenever the act of any State, whether Legislative Executive *or* Judiciary shall be attested . . . such attestation . . . shall be deemed in other States as full proof of the existence of that act—and its operation shall be binding in every other State, *in all cases to which it may relate*, and which are *within the cognizance and jurisdiction* of the State, where—in the said act was done.¹³⁵

The second resolution, moved by Gouverneur Morris, read, "[T]he Legislature shall by general laws, determine the proof and effect of such acts, records, and proceedings."¹³⁶

The content of the Morris resolution, to which Randolph later objected as "so loose as to give . . . opportunities of usurping all the State powers,"¹³⁷ eventually prevailed.¹³⁸ Randolph's clause, favored by him because more restrictive, clearly would have assigned interstate choice-of-law responsibility to the federal government; and there is no reason to think that the Morris resolution did not have that as well as additional objectives.¹³⁹

The purpose to assign choice-of-law responsibility to the federal government and to use the diversity grant as the vehicle for its discharge is corroborated by the work of the first Congress. Although the Judiciary Act of 1789 conferred on the courts only a small por-

130. ARTICLES OF CONFEDERATION, art. IV: "Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State."

131. 2 FARRAND 188.

132. *Id.* at 447-48.

133. *Ibid.* The special committee consisted of Gorham, Johnson, Randolph, Rutledge, and Wilson. *Id.* at 448.

134. See *id.* at 448, 488-89.

135. *Id.* at 448. (Emphasis added.)

136. *Ibid.*

137. *Id.* at 489.

138. *Id.* at 483-89 (U.S. CONST. art. IV, § 1).

139. Randolph's resolution, more clearly than the final constitutional language, places state decisional laws within the full-faith-and-credit-to-laws mandate.

tion of the judicial power embraced by article III, it did confer jurisdiction in diversity cases¹⁴⁰ notwithstanding strong opposition.¹⁴¹ The conferral evidenced an importance then attached to diversity jurisdiction totally inconsistent with the trivial function left to it today. In section 34 of the act, the Rules of Decision Act, the role of state law was set forth:

The laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States *in cases where they apply*.¹⁴²

Although much attention has been devoted to the meaning of the first phrase, too little has been given to the reason for selecting the words used in the last phrase. They were not used to accommodate the operation of the Constitution, treaties, and statutes; that was accomplished by the "except" clause. Certainly they were not selected to refer to the laws of the state in which the court was sitting as *Klaxon* holds; Congress knew how to prescribe that reference when it intended to do so: the same men who enacted section 34 five days later passed the Process Act.¹⁴³ Section 2 of that act, which is separated from section 34 in the statute book by one page, directed that procedures in the federal courts "shall be the same in each state respectively as are now used or allowed in the supreme courts of the same." The phrase "in cases where they apply" has a quality of deliberate flexibility that suggests the drafters did not think it wise to attempt specification of the cases to which any one state's law would apply.¹⁴⁴ The phrase invites judicial elaboration of a standard; and he who suggests that a rigid, precise rule like the *Klaxon* rule be adopted must bear the burden of explaining why the drafters did not state the rule themselves.

I conclude from the foregoing analysis of choice problems and constitutional history that *Klaxon* should be overturned. Like *Swift v. Tyson*, it involves not merely an erroneous interpretation

140. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73. The history of the act is described in detail in Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

141. See Warren, *supra* note 140, at 76-90, 125-27.

142. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 92. (Emphasis added.)

143. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93.

144. That § 34 was intended to incorporate choice-of-law principles was clear to the Supreme Court in 1825: "[T]his section is the recognition of universal law; the principle that, in every forum, a contract is governed by the law with a view to which it was made." *Wayman v. Southard*, 22 U.S. (10 Wheat.) 1, 48 (1825) (Marshall, C.J.).

of the Rules of Decision Act but an interpretation that runs counter to constitutional allocation of responsibilities—one that “no lapse of time or respectable array of opinion should make us hesitate to correct.”¹⁴⁵ The comparative-impairment principle should be adopted as the standard for applying both the Rules of Decision Act and the full-faith-and-credit-to-laws mandate. The comparative-impairment principle, as subsequently elaborated by the federal courts, should be held binding for the purpose of initial choice reference on state courts in accordance with the supremacy clause.

Federal responsibility is to shelter state policy and therefore does not extend beyond initial reference to the whole law of the state to which the comparative impairment principle points. If the state afforded shelter by the principle would not apply its own internal law, there is no justification for compelling it or any other state to apply that internal law. For the reasons set forth in the first parts of this paper, I argue that every state should, as a matter of state law, adopt the comparative impairment principle; but I cannot justify a federal compulsion to do so.

Thus limiting the pervasiveness of the federal role, in addition to comporting with sound principles of federalism, may prove to have a valuable advantage. To the extent that states do adopt the general principle of comparative impairment for purposes of choice references beyond the first, a multiplicity of judicial voices will participate in the elaboration of the principle. Risk of premature crystallization of the principle will thus be minimized.

145. *Black & White Taxi Co. v. Brown & Yellow Taxi Co.*, 276 U.S. 518, 533 (1928) (dissenting opinion). See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

TOWARD A FEDERAL COMMON LAW OF CHOICE OF LAW

Harold W. Horowitz*

No field of American law today is more the object of creative rethinking than that of choice-of-law. Stemming particularly from Professor Currie's asking whether a choice-of-law problem is an appropriate issue for resolution by the judicial process,¹ there has been increasing attention focused on how courts do, and should, resolve "true" conflicts of laws. Much of the current thinking emphasizes that the choice-of-law problem is primarily one of allocation of "spheres of legal control"² among governmental entities—that though a choice-of-law problem almost always arises in the context of a dispute between private parties, the underlying issue is to a great extent that of subordinating one governmental "interest" or "policy" to another, of determining which state's policy will be effectuated when two or more states have some reasonable basis for having their policies control.³

Professor Cavers has stated what appears to me to be the most constructive current approach to solving choice-of-law problems: in cases of true conflict "the court is to seek a rule for choice of law or a principle of preference which would either reflect relevant multi-state policies or provide the basis for a reasonable accommodation of the laws' conflicting purposes."⁴ Consideration of multistate or interstate values and interests in the federal system, and of ways in which to harmonize or reconcile conflicting state policies, are surely the basic elements of an approach to choice of law in a federal system. Recent studies by Professors Von Mehren and Trautman⁵

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1 "[A]ssessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function which should not be committed to courts in a democracy. It is a function which the courts cannot perform effectively, for they lack the necessary resources." Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176, reprinted in CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177, 182 (1963).

2 See, e.g., Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 22 (1963).

3 A state itself may occasionally seek to assert, in a private litigation, that its policy should prevail over another state's. See, e.g., Reply Brief of the State of Florida, *Amicus Curiae*, *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964).

4 CAVERS, *THE CHOICE-OF-LAW PROCESS* 64 (1965).

5 VON MEHREN & TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* (1965).

and Professor Baxter⁶ have, with penetrating insights, concentrated on aspects of the approach summarized by Professor Cavers. Other scholars have centered attention on various factors which courts should take into account in making choice-of-law decisions. Though they use different terminology, much of what they suggest refers to "relevant multistate policies" or "reasonable accommodation of the laws' conflicting purposes." Professor Leflar, for example, has recently suggested that pertinent choice-of-law factors can usefully be placed in five categories: predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests, and application of the better rule of law.⁷ The first three of these factors suggest the same type of approach as summarized by Professor Cavers. Professors Cheatham and Reese included in their list of policy factors affecting choice-of-law decisions "the needs of the interstate and international systems," "certainty, predictability, uniformity of result," "protection of justified expectations," and "application of the law of the state of dominant interest."⁸ These, too, are factors which are reflected in Professor Cavers' summary. Professor Ehrenzweig's "rule of validation"⁹ for determining the validity of contracts—applying the law of any state related to the transaction which would uphold it—seems also to be grounded, at least in part, in multistate policy values. So too, the *Restatement (Second), Conflict of Laws* refers to the factors listed by Professors Cheatham and Reese, and states: "The forum should seek to reach a result that will achieve the best possible accommodations of . . . [the relevant policies of the forum and of all other interested states]. The forum should also appraise the relevant interests of the states involved in the determination of the particular issue."¹⁰ And in providing, for example, that a court should apply the law of the state which has the "most significant relationship" with the occurrence and with the parties to determine their rights and liabilities in tort, the *Restatement* states that the court should consider various contacts of the transaction with the states involved, and that "in determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states."¹¹ Much of the analysis in current

⁶ Baxter, *supra* note 2.

⁷ Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966).

⁸ Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

⁹ EHRENZWEIG, *CONFLICT OF LAWS* 465 (1962).

¹⁰ RESTATEMENT (SECOND), *CONFLICT OF LAWS* § 6, comment *f* (Proposed Official Draft Pt. I, 1967).

¹¹ RESTATEMENT (SECOND), *CONFLICT OF LAWS* § 379 (Tent. Draft No. 9, 1964).

literature which demonstrates "false conflicts" in apparent choice-of-law problems is in effect disclosing means of accommodating the conflicting purposes of varying state laws.¹² Current thinking in choice-of-law, in sum, is, as stated in Professor Freund's germinal article, "to understand, harmonize, and weigh competing interests in multistate events,"¹³ and sees the choice-of-law problem, as described by Chief Justice Traynor, as "the classic political problem of weighing, adjusting, and harmonizing diverse community values"¹⁴

My purpose in this essay is not to offer an additional analysis of choice-of-law theory, nor to attempt to extract the quintessence of the themes of the judges and academicians who are engaged in the current reanalysis. My point here, in attempting to describe some of the fundamentals of present thinking, is to provide the background for highlighting an aspect of the choice-of-law problem which is seemingly not now sufficiently the object of intensive discussion—what are the authoritative sources, in the federal system, of principles of choice-of-law? The assumption is, generally, that choice-of-law is state law in the federal system, that each state has its own body of conflict of laws doctrine, within broad limits set by the federal constitution, which its courts apply when they are the forums in which a choice-of-law problem is to be resolved. *Klaxon Co. v. Stentor Elec. Mfg. Co.*¹⁵ was the Supreme Court's declaration that each state has its own legal doctrine for the resolution of conflicts of laws. This essay raises the question whether, particularly in the light of current conflicts thinking, choice of law should not better be viewed as federal law or, more specifically, as a body of federal common law.

There are current explorations of the source of conflicts doctrine in the federal system. For example, Professors Von Mehren and Trautman say that allocation of law making competence as

¹² See, e.g., Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo*, 18 STAN. L. REV. 1299 (1966); Weintraub, *A Method for Solving Conflict Problems*, 21 U. PITT. L. REV. 573 (1960); Comment, *False Conflicts*, 55 CALIF. L. REV. 74 (1967).

¹³ Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1235-36 (1946).

¹⁴ Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 675 (1959). See also Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 811 (1955): "The problem is that of finding the right way in which these states can harmoniously coexist within that Union so that each can pursue and fulfill its aims and purposes without hampering the corresponding aims and purposes of every other."; Sohn, *New Bases for Solution of Conflict of Laws Problems*, 55 HARV. L. REV. 978, 995 (1942): "A compromise must be devised to apportion the disputed class of cases between the two conflicting laws, giving each its due share."

¹⁵ 313 U.S. 487 (1941).

between states is "inherently and unquestionably a federal problem."¹⁶ The point has been persuasively made by Professor Baxter that responsibility for allocating spheres of legal control among the states cannot soundly be placed elsewhere than at the federal level; he finds that responsibility provided for in the full faith and credit clause, and finds the diversity jurisdiction of the federal courts as the vehicle for the discharge of that responsibility.¹⁷ Professor Hart states that *Klaxon* "has paralyzed the capacities of the federal courts to further one of the central desiderata of a federal system."¹⁸ But he apparently goes only to the point of contending that the choice-of-law rules the federal courts would declare when freed of the *Klaxon* command would not be the supreme law of the land—state courts could continue to develop their own choice-of-law principles.¹⁹ Apparently also viewing the principal alternative to state autonomy to be a *Swift v. Tyson* non-supreme choice-of-law doctrine in the federal courts, Professor Cavers argues that state autonomy to resolve choice-of-law issues should be preserved.²⁰

The thesis I shall explore here, to expand on these current discussions, is that choice of law in the federal system would be most soundly theorized to be federal law—that *Klaxon* was wrongly decided not because federal courts should be free to make independent conflict-of-laws decisions while states concurrently have their own bodies of conflicts doctrine, but because there should be, inherent in the federal system, no autonomy for a state to resolve a problem of conflict of its law with that of another state. Federal courts and state courts should be viewed as participating together in the development of federal choice-of-law principles, with the Supreme Court as the final arbiter as it is in other areas of federal common law.

In what follows in this article, I shall (1) describe in somewhat more detail the current thinking in conflicts which I believe to be the soundest approach to choice of law, as the basis for the point that federal law should be the source of the doctrine which can give effect to this current thinking, (2) discuss those areas in which the Supreme Court has articulated federal common law doctrine which are relevant to recognition of a federal common law of choice of law, and (3) consider the arguments which might be made against acceptance of this principle.

¹⁶ VON MEHREN & TRAUTMAN, *op. cit. supra* note 5, at 1218.

¹⁷ Baxter, *supra* note 2.

¹⁸ Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513 (1954).

¹⁹ See Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROB. 732, 735 (1963).

²⁰ CAVERS, *op. cit. supra* note 4, at 216-24.

I

Current thinking, we have seen, emphasizes solution of a choice-of-law problem by utilizing multistate policies or by seeking an accommodation of the purposes of the conflicting laws.

The pertinence of multistate policies is well illustrated in the impact of the commerce clause on state legislation, where a rationally-based state policy which has impact beyond the state's borders occasionally must give way to the national or federal interests made supreme by the clause. At times the commerce clause supplies the policy for resolution of a problem which involves a conflict of state laws. *Bibb v. Navajo Freight Lines, Inc.*²¹ was such a case. There an Illinois regulation requiring a specific type of mudguard for trucks and trailers was held invalid under the commerce clause. The impermissible burden on interstate commerce was found in part in the facts that: (1) the Illinois requirement conflicted with Arkansas mudguard regulations, so that an interstate truck or trailer could not comply with both states' rules at the same time; and (2) the Illinois requirement was different than the less-demanding requirements of almost all other states, so that an interstate truck or trailer could comply with Illinois' and these other states' requirements at the same time only by complying with the unique Illinois rule. *Bibb* presented a conflict in state policies for highway safety. The commerce clause was there held to prevent Illinois from insisting upon giving effect to its policy. There was no federal mudguard rule, and the effect of the decision was to say that state policies other than Illinois' would prevail with respect to mudguard requirements for interstate trucks and trailers. One may wonder whether the commerce clause has not been under-utilized in present approaches to choice-of-law as a federal constitutional control on state choice-of-law doctrines where the conflicts of state laws relate to interstate commercial transactions. That question will not be explored here. What is significant for present purposes is that in *Bibb* a national or multistate policy—i.e., a multistate interest in facilitating interstate transactions—led to the subordination of one state's policy to another's. It is this factor of facilitation of multistate transactions which can be found, though perhaps not so articulated, in judicial decisions and current academic thought about the choice-of-law problem.

Order of United Commercial Travelers v. Wolfe,²² a full faith and credit decision, is an example of the applicability of a factor of facilitation of multistate activity. There the issue was the validity

²¹ 359 U.S. 520 (1959).

²² 331 U.S. 586 (1947).

of a standard provision in a life insurance contract issued by a fraternal benefit association to members in many states, and the Court's result was to require that all states apply the law of the state of incorporation of the association to determine the validity issue. With many persons in different states bound together by similar multistate transactions, the selection of one common-denominator state's policy to govern facilitated the multistate transactions. Chief Justice Traynor's opinion in *Bernkrant v. Fowler*²³ referred to such a factor in determining that an oral contract to cancel a debt by provision in the promisor's will would be enforced as permitted under the law of the state of Nevada, though it would be unenforceable under California law, the law of the domicile of the promisor at the time of his death. Chief Justice Traynor concluded that there was "no conflict" between California and Nevada law in the case. One factor in his decision was his response to the contention that the Nevada promisees would have been alerted to the possibility that the California Statute of Frauds might apply to the transaction if the promisor had been domiciled in California at the time of the transaction. (It was not clear where the promisor was domiciled at that time.) Chief Justice Traynor said:

Since California, however, would have no interest in applying its own statute of frauds unless . . . [the promisor] remained here until his death, plaintiffs were not bound to know that California's statute might ultimately be invoked against them. Unless they could rely on their own law, they would have to look to the laws of all of the jurisdictions to which . . . [the promisor] might move regardless of where he was domiciled when the contract was made.²⁴

*Babcock v. Jackson*²⁵ is perhaps best analyzed as having been a false conflict case; but the New York Court of Appeals, in holding that a "guest" in an automobile could recover from her "host" under New York law when the journey began in New York and terminated with an accident in Ontario, under the law of which the guest had no claim, referred as well to an aspect of a policy of facilitation of multistate activity: "Although the rightness or wrongness of defendant's conduct may depend upon the law of the particular jurisdiction through which the automobile passes, the rights and liabilities of the parties which stem from their guest-host relationship should remain constant and not vary and shift as the automobile proceeds from place to place."²⁶ The same factor can be utilized to explain earlier choice-of-law cases. For example, *Milliken v.*

²³ 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

²⁴ *Id.* at 596, 360 P.2d at 910, 12 Cal. Rptr. at 270.

²⁵ 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

²⁶ *Id.* at 483, 191 N.E.2d at 285, 240 N.Y.S.2d at 751.

*Pratt*²⁷ can be so viewed, in applying the law of the seller's place of business to hold a married woman from another state to her contract, where under the law of the woman's domicile she would not have legal capacity to enter into the transaction. Selection of the seller's state's policy to prevail would facilitate the seller's ability to engage in interstate transactions. Similarly, the result in *Polson v. Stewart*²⁸ could have been rested, at least partly, on effectuating a policy of facilitating multistate transactions. There a husband and wife executed a separation agreement which apparently included mutual conveyances of their rights with respect to property located in different states. Here facilitation of a transaction related to more than one state would be advanced by not having validity of the transaction be piecemeal, depending upon the situs of the property, but rather by selecting the "common denominator" law of the parties' domicile.

Another illustration of this factor is the widely accepted principle that a stipulation of parties by contract as to choice of law to govern their transaction will be given effect if the policy selected to govern is that of a state with a reasonable relationship to the transaction. Effectuation of the parties' choice in such a case advances a policy of facilitating multistate activity. "Instead of viewing the parties as usurping the legislative function, it seems more realistic to regard them as relieving the courts of the problem of resolving a question of conflict of laws. . . . A tendency toward certainty in commercial transactions should be encouraged by the courts."²⁹ The qualification that the state selected by the parties have a reasonable relationship to the transaction is a further reflection of application of a multistate policy, though it is more closely related to the factor of accommodating or harmonizing conflicting state policies, for it gives effect to a principle that in the federal system a state's policy should not be subordinated to that of another state, regardless of the parties' desires, unless the policy of the other state will be advanced by so doing.³⁰

²⁷ 125 Mass. 374 (1878). The court said: "In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one state to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicil of those with whom they deal, and to ascertain the law of that domicil, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all." *Id.* at 382-83. See Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1102 (1956).

²⁸ 167 Mass. 211, 45 N.E. 737 (1897).

²⁹ *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189, 195 (2d Cir. 1955).

³⁰ I have referred here only to facilitating multistate transactions as an example

It is perhaps essential here to point out that this cursory review of the usefulness of utilizing a factor of making a choice of law so as to facilitate multistate activities is not meant to suggest that this factor alone will decide a case. It is sought only to isolate this multistate policy for separate attention, to be followed by the observation that, to the extent that this type of policy is pertinent to resolution of a conflict of laws, federal law should in theory be the source of the doctrine that determines the application of the principle in a specific case. Just as it is federal law (under the commerce clause) which determines whether a state's policy constitutes an unreasonable burden on interstate commerce, federal law should determine which of two conflicting state policies, each with good reason for application in the specific case, should be subordinated so as to facilitate the carrying on of multistate activities. If one of the values or norms which is pertinent to the making of a choice of law is that of facilitating multistate activity, of minimizing frictions or barriers to constructive private activity across state lines, it seems clear that a state should not have autonomy to determine when that multistate value should lead to subordinating its policy to that of another state.

Professors Baxter and Cavers direct our attention to the policy, in resolving a conflict of laws, of making a "reasonable accommodation of the laws' conflicting purposes." Professor Baxter's summary of his suggested "comparative impairment" principle is this:

The extent to which the purpose underlying a rule will be furthered by application or impaired by nonapplication to cases of a particular category may be regarded as the measure of the rule's pertinence and of the state's interest in the rule's application to cases within the category. Normative resolution of real conflicts cases is possible where one of the assertedly applicable rules is more pertinent to the case than the competing rule.³¹

He would apply this principle in a usury case in this way: the choice-of-law decision should be based upon the lender's knowledge of the borrower's residence (and therefore of the law of the borrower's residence). This would afford maximum implementation of

of a multistate policy in the federal system. Another factor in choice-of-law decisions is that of not effectuating a state's policy if it would be contrary to the expectations of the party who would be adversely affected by that policy. This has due process aspects from the standpoint of the party so affected. The interests of the individual there outweigh the state's interest in effectuating its policy. This, too, represents a "multistate" value judgment, does it not, and aside from the due process aspects of the problem, should not federal law be the measure of determining when the "non-expectations" of a party should be sufficiently weighty to preclude the application of a state's law to him?

³¹ Baxter, *supra* note 2, at 9.

the policies of both states. The lender's consensual expectations would be protected except when he had reason to know the transaction would be forbidden by the borrower's state, and the objectives of the borrower's state would be shielded from wholesale evasion.³² (Note, too, the place in the analysis of such a problem of separate articulation of the policy of facilitating multistate activities.)

Professor Cavers proposes an analogous approach of accommodating conflicting state interests in such a way that applying one will not intrude unfairly on the interests of the other state. For example, he suggests as a "principle of preference" that a state's protective policy with respect to a party to a contractual transaction should apply where the person protected has a home in the state, and the transaction is centered there, or if not centered there the transaction was the product of an effort to evade the protective law.

The principle here proposed gives preference to the protective law but only under circumstances that would lead to little, if any, interference with ordinary business activity in the nonprotective state The conditional seller who deals with a New Hampshire buyer who buys for use in that state ought to resign himself to the protective features of New Hampshire law.³³

The effort here is in effect to determine which state's policy would be more greatly impaired if it were subordinated to the other state's policy. No attempt is made here to discuss the difficult questions which arise in making such judgments about the conflicting state laws.³⁴ Certainly there should be consideration in any such analysis of the correlative policy of facilitating multistate activities.

³² *Id.* at 15.

³³ CAVERS, *op. cit. supra* note 4, at 183, 186.

³⁴ For an excellent example of making such a judgment see Professor Trautman's analysis of *Kell v. Henderson*, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965), *aff'd*, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (3d Dep't 1966), a "reverse" *Babcock v. Jackson* problem, in which an Ontario guest sued an Ontario driver in a New York court for damages for injuries arising out of an accident in New York. The New York court held that New York law, permitting the guest to recover, would apply, instead of Ontario law, which would deny recovery. Professor Trautman concludes that "it seems fair to say that the original possible policies underlying the [Ontario guest] statute—against collusive suit and against ungrateful guests—have lost their vitality. . . ." Trautman, *A Comment: Kell v. Henderson*, 67 COLUM. L. REV. 465, 471 (1967). "If one can say so confidently, then New York should be free to go ahead with its own view. If the policy is outdated, New York can rely on such diverse conflicts favorites as *Milliken v. Pratt* and *Grant v. McAuliffe* to say there is no reason to hesitate: just as no policy underlying the rule of Massachusetts in *Milliken* and of Arizona in *Grant* remained to be effectuated, so also would that be true in *Kell*." *Id.* at 470. (Footnotes omitted.) Professor Trautman seems to suggest a conclusion of "false conflict" in these cases. Perhaps a better way to state his conclusion in *Milliken* and *Kell* is that there was a policy which Massachusetts and Ontario had reason to have effectuated in each of the cases—because, after all, those policies, though "outdated," were nevertheless

The conclusions suggested by Professors Baxter and Cavers may in effect be saying to the out-of-stater that his choices are either not to engage in the activity which would bring him into relationship with the state or to accommodate his activity to the state's policy. I wish only to point out that to the extent such norms for resolution of conflicts of laws can be developed, federal law should be the source of the legal doctrine which makes such judgments.

Subordination of one state's policy to another's because the other state's policy would suffer the greater impairment if not effectuated, or because it is concluded there would not be an "unfair intrusion"³⁵ on the interests of the state whose policy is subordinated, is a frank attempt to compare what might be called the intensity or significance of each state's interest in having its policy applied. Neither state with an interest in having its policy govern should have autonomy to make such a resolution when the states are members of a federal union and there is a means by which federal law can make that judgment.³⁶

II

Given that the authoritative source of choice-of-law doctrine must be either state or federal law in the federal system, there appears to be little doubt that, theoretically at least, federal law is the sounder conclusion if factors of facilitating multistate activities and

existent and applicable in these cases. But if those policies "have lost their vitality," then because one of the conflicting state policies in each of these cases must prevail, there may be less relative impairment of the policies of Massachusetts and Ontario if they are subordinated.

The substance-procedure dichotomy in choice of law can be described in terms of subordinating the interest which would be least frustrated if it were not given effect. The interest of the forum prevails on matters of "procedure"; in general those matters which are placed within the category of procedure are matters as to which states other than the forum have little or no interest in having their policies applied.

For an example of this approach in a case involving full faith and credit to a foreign judgment see *Estin v. Estin*, 334 U.S. 541, 549 (1948): "The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern."

³⁵ See, e.g., CAVES, *op. cit. supra* note 4, at 54-55.

³⁶ See *Williams v. North Carolina*, 325 U.S. 226, 232 (1945): "To permit the necessary finding of domicile by one State to foreclose all States in the protection of their social institutions would be intolerable.

"But to endow each State with controlling authority to nullify the power of a sister State to grant a divorce based upon a finding that one spouse had acquired a new domicile within the divorcing State would, in the proper functioning of our federal system, be equally indefensible. No State court can assume comprehensive attention to the various and potentially conflicting interests that several States may have in the institutional aspects of marriage. The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another State to grant divorces can be left to neither State."

accommodation of conflicting state interests are to be the basis for solution of choice-of-law problems. Thus if the choice-of-law problem is essentially one of determining which of conflicting state interests is to prevail, the analogy to the Supreme Court's resolution of controversies between states, which are resolved by federal common law, may be a compelling one in suggesting that choice-of-law doctrine be approached as a matter of federal common law.

The Supreme Court's approach to determination of the authoritative source of the controlling law in cases involving conflicting state escheat claims, apportionment of interstate waters, and boundary disputes illustrates what Judge Friendly has described as the emergence of a "federal decisional law in areas of national concern."³⁷ In *Texas v. New Jersey*,³⁸ an original action to determine which state could escheat rights under debts owed by a corporate obligor, the Court declared a rule for decision of the interstate controversy. It did not find the rule in constitutional or statutory interpretation; it frankly declared a principle of supreme federal common law:

Since the States separately are without constitutional power to provide a rule to settle this interstate controversy and since there is no applicable federal statute, it becomes our responsibility in the exercise of our original jurisdiction to adopt a rule which will settle the question of which State will be allowed to escheat this intangible property.³⁹

The Court has made analogous declarations of federal common law in interstate water controversies, sometimes in original actions between states and sometimes in actions involving private parties:

[W]hether the water of an interstate stream must be apportioned between the two States is a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.⁴⁰

³⁷ Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 405 (1964). See Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084 (1964).

³⁸ 379 U.S. 674 (1965).

³⁹ *Id.* at 677.

⁴⁰ *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). See also *New Jersey v. New York*, 283 U.S. 336, 342-43 (1931): "It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be." In *Banco Nacional de Cuba v. Sabba-*

*Banco Nacional de Cuba v. Sabbatino*⁴¹ provides an insight into what the Court has done in the cases involving controversies between states. One of the issues was the question of the source of applicable law, federal or state, to determine the application of the act-of-state doctrine in the case before the Court. The Court decided that federal law governed, referring to analogous "enclaves of federal judge-made law which bind the States," and concluding that "the problems surrounding the act of state doctrine are, albeit for different reasons, as *intrinsically federal* as are those involved in water apportionment or boundary disputes."⁴²

The basic inquiry suggested by current thinking in conflict of laws is whether the problems in choice between conflicting state laws are as "intrinsically federal" as are those involved in the escheat, water apportionment, boundary, and act-of-state cases.⁴³ There has been recognition that the source of some conflicts doctrine is federal. In maritime cases, where the conflict of policies is between "American" law—federal maritime law, or, perhaps, the law of a state—and the law of a foreign nation, federal courts have said that a judicially-declared federal choice-of-law rule determines the governing law.⁴⁴ There is no lack of relevant judicial doctrine for

mino, 376 U.S. 398 (1964), the Court said of *Hinderlider*: "The decision implies that no State can undermine the federal interest in equitably apportioned interstate waters even if it deals with private parties." *Id.* at 427.

⁴¹ 376 U.S. 398 (1964).

⁴² *Id.* at 425, 426, 427. (Emphasis added.) See also Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 833 (1957): "The enduring contribution of *Clearfield* is its clear establishment of power in the federal courts to select the governing law [i.e., federal or state] in matters related to going operations of the national government."

⁴³ Professor Henkin has suggested an alternative rationale for *Sabbatino* which would be closely analogous to the choice-of-law problem: "Perhaps one can suggest a basis for the Court's power in *Sabbatino*, not in the special character of foreign relations, or in that alone, but in the special character of Act of State. Act of State, one might say, is a doctrine particularly for the guidance of courts, and is related to principles of conflicts which are usually developed by the courts themselves. It may perhaps even follow that in this area 'intrinsically federal,' where the state interest was relatively secondary, where law was essential to maintain uniformity and to prevent embarrassing idiosyncrasy by the states, the courts did not have to wait on the political branches and could make law that should also bind the states and the state courts." Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 819 (1964).

⁴⁴ *E.g.*, *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, 193 (2d Cir. 1955): "[T]he claim here is for a tort committed on the high seas and the federal choice-of-law rule might well be binding on the state courts, if either rule is to be binding in both sets of courts." See also *Jansson v. Swedish American Line*, 185 F.2d 212, 218 (1st Cir. 1950): "In developing and formulating 'approved rules of the general maritime law,' the federal courts are necessarily confronted, from time to time, with choice of law problems; and the rules for determining such choices become themselves a part of the general maritime law as understood and applied in the United States."

the development of a federal common law of choice of law to resolve conflicts of state policies.⁴⁵

III

What arguments might be made against placing the source of choice-of-law doctrine in federal common law?

There might be concern about the courts, particularly federal courts, developing such legal doctrine in the absence of a specific constitutional or statutory authorization. The Supreme Court's decisions in *Sabbatino* and the interstate controversy cases suggest that such specific authorization is not necessary. In *Sabbatino* the Court pointed out that there are "enclaves of federal judge-made law which bind the States,"⁴⁶ illustrated by the "national body of federal-court-built law" under section 301 of the Labor Management Relations Act.⁴⁷ But the Court said that perhaps more directly in point in determining if application of the act-of-state doctrine was to be determined by federal or state law were the bodies of law applied in apportioning interstate waters and resolving state boundary disputes, where the "federal interest guarded" in the cases was not derived from a federal statute. In the interstate waters⁴⁸ and boundary cases,⁴⁹ and in *Texas v. New Jersey*⁵⁰ there was no federal constitutional or statutory principle (beyond, perhaps, the grant of federal judicial power in controversies between states) which could serve as the specific authorization for judicial development of the legal doctrine which would resolve the dispute between the states. And in *Sabbatino* there was not even an article III grant of judicial power on which the federal common law principle declared there might be based.

There are, though by virtue of *Sabbatino* and the interstate controversy cases they may not be essential, possible specific constitutional or statutory bases for a federal law of choice of law. The constitutional provision would be the full faith and credit clause. The question has been much discussed whether the full faith and credit clause was designed to be the basis for constitutional resolu-

⁴⁵ See Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 408 n.119 (1964): "[T]he Constitution can well be deemed to require that the federal court should fashion law when the interstate nature of a controversy makes it inappropriate that the law of either state should govern."

⁴⁶ 376 U.S. at 426.

⁴⁷ 61 Stat. 156 (1947), 29 U.S.C. § 185 (1964). See *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957).

⁴⁸ See cases cited note 40 *supra*.

⁴⁹ See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838).

⁵⁰ 379 U.S. 674 (1965).

tion of all conflicts of laws problems within the federal system.⁵¹ Such an interpretation of full faith and credit would permit introducing current conflicts thinking into the clause; this would make the federal law of choice of law constitutional doctrine, not as flexible, or as subject to legislative law-making, as federal common law. But if the full faith and credit clause continues to be viewed, with narrow exceptions, as not containing choice-of-law principles, there yet remains the question whether this view would preclude an independent basis for a federal common law of choice of law. It certainly need not follow that because the full faith and credit clause was not designed to include choice-of-law doctrine, there can be no federal common law of conflicts.⁵²

A possible statutory basis for development by federal courts of a supreme federal law of choice of law should also be noted. This is the Rules of Decision Act, which can be analogized to section 301 of the Labor Management Relations Act. It provides that "The laws of the several states, except where the Constitution or

⁵¹ See 1 CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES*, 549-53 (1953); Baxter, *supra* note 2; Goodman, *Eighteenth Century Conflict of Laws: Critique of an Erie and Klaxon Rationale*, 5 AM. J. LEGAL HIST. 326 (1961); Jackson, *Full Faith and Credit—The Lawyers' Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945); Rheinstein, *supra* note 14; Sumner, *The Full-Faith-and-Credit Clause—Its History and Purpose*, 34 ORE. L. REV. 224 (1955); Sumner, *The Status of Public Acts in Sister States*, 3 U.C.L.A. L. REV. 1 (1955). See also Note, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325 (1964). But see Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 73 (1957): "[T]he view that the clause was designed to convey, without implementing laws, to the courts of one state a constitutional command that they apply, *whatever their own law*, the legislative acts of another state, finds no support in the intentions of the drafters . . ." (Emphasis added.) Dr. Nadelmann referred to Mr. Justice Stone's statement in *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532, 547 (1935), that "A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." Utilization of the command of full faith and credit as the basis for a supreme federal law of choice of law need not involve "rigid and literal enforcement," or a command that a state apply the law of another state "without regard to the statute of the forum." Choice-of-law doctrine based on facilitation of multistate transactions and accommodation of conflicting state interests would select *one* state's law to govern, not direct each state to apply the other state's law.

⁵² What role would there be for constitutional doctrine pertaining to conflict of state laws if choice-of-law principles were to be federal common law? Limitations on state law found in the due process, equal protection, and, perhaps, commerce clauses would still be relevant—they would set limits to the interests of states in having their policies prevail. The role of federal choice-of-law doctrine would be to determine which state's law would govern from among those states with constitutionally permissible interests in having their policies apply. And if the full faith and credit clause continues to be interpreted not to apply to all choice-of-law problems—leaving it to apply in areas such as judgments and the *Hughes v. Fetter*, 341 U.S. 609 (1951), type of problem—it should not be a barrier to concurrent development of federal common-law choice-of-law doctrine.

treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions, in the courts of the United States, *in cases where they apply*.⁵³ Professors Hart and Baxter have pointed out the potential significance of the italicized language as an authorization to the federal courts to determine *which* state law should be applied in a conflicts problem in a federal court.⁵⁴

Professor Cavers has recently, in defending *Klaxon*, treated many of the other arguments which might be made against recognition of a federal common law of choice of law.⁵⁵ In appraising these arguments it should be kept in mind that much of his discussion is based on the assumption that the alternative to *Klaxon* is the pre-*Erie* pattern in which federal courts could declare choice-of-law principles for application in federal courts which would not be binding upon the states. He places great emphasis in his contention that *Klaxon* was rightly decided on the importance, in the federal system, of state autonomy in determining the territorial reach of state law.⁵⁶ *Klaxon* stressed the significance of state law-making autonomy, without discussing whether there are differing values in state autonomy in wholly domestic situations as opposed to situations involving conflicts of state laws:

Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws.⁵⁷

The question is whether choice of law should be considered to be a matter of "local" policy which states should have autonomy to pursue divergent to the policies of their neighbors.⁵⁸ The Supreme

⁵³ 28 U.S.C. § 1652 (1964). (Emphasis added.)

⁵⁴ Hart, *supra* note 18, at 515; Baxter, *supra* note 2, at 40-41. But see CAVERS, *op. cit. supra* note 4, at 220 n.39. And see *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 48 (1825): "[T]his section [the Rules of Decision Act] is the recognition of a principle of universal law; the principle that in every forum a contract is governed by the law with a view to which it was made."

⁵⁵ CAVERS, *op. cit. supra* note 4, at 216-24.

⁵⁶ See also Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953); Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 493 (1960): "[There is no compelling reason for two states to have the same choice of law rule when each state has] substantial contacts with a particular controversy; when these states have significantly divergent policies; and then when pursuit by each state of its own policies would not produce unfairness, or a condition of mutual inconvenience, or prejudice to the national interest generally."

⁵⁷ 313 U.S. at 496. (Emphasis added.)

⁵⁸ There are two aspects to state "autonomy" here which should be distinguished.

Court has indeed found a broad range for such state autonomy in its decisions on constitutional limitations on state conflicts law.⁵⁹ But the question should be asked whether the Court's due process doctrine in choice-of-law cases has not been too patly analogized to application of due process doctrine to state law which has solely domestic impact. In the latter case, state law will generally be sustained if there is a reasonable or rational basis for the policy. This general approach to due process limits on state law has been soundly carried over to some types of cases in which the extraterritorial application of state law has been in issue. For example, state courts are permitted to exercise jurisdiction over defendants if there is a reasonable basis for doing so.⁶⁰ And the Court has upheld the power of a state to regulate conduct of its citizens on the high seas, outside the territorial limits of the state, but inimical to the states' interests.⁶¹ But these examples, resting upon maximum scope of state autonomy to determine the reach of state law, differ fundamentally from the choice-of-law problem. In these situations no subordination of any interested state's policy is necessary. For example, there is no difficulty in permitting more than one state, at one time, to have a basis of judicial jurisdiction to require the same defendant to defend the same action. There may be problems of harassment and duplication if the defendant is actually proceeded against in more than one state, but there is nothing unworkable or unsound in the proposition that more than one state can require the defendant to defend the action. In the cases upholding the power of a state (and the federal government) to regulate conduct of its citizens on the high seas the Court has specifically noted, in effect, that there was no conflict of governmental interests:

[T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. . . . If the United States may control the conduct of its citizens upon the high seas, we see no reason why the

States should be able to determine, within broad constitutional limits, the territorial reach of state policy to the extent that that issue can be separated from the choice-of-law decision itself. That is, states should have extensive autonomy to determine if they have an interest in having their domestic policies applied in varying multistate fact patterns. But that is a different matter than whether a state in the federal system should be permitted to determine whether another state's policy, having a reasonable basis to be given effect, should be subordinated. There is a considerable difference between a state having autonomy to determine if its interests are involved in a multistate problem and a state having autonomy to determine, in a case of conflict of state policies, which state's policy will prevail.

⁵⁹ See, e.g., *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954).

⁶⁰ See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁶¹ See, e.g., *Skiriotes v. Florida*, 313 U.S. 69 (1941).

State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress. . . . [T]he bare fact of the parties being outside the territory in a place belonging to no other sovereign would not limit the authority of the State.⁶²

These cases can soundly authorize maximum scope for state autonomy to determine the reach of state law because there is no conflict of state laws requiring that one, and *only* one, law be chosen to determine the legal consequences of the transaction before the court.

One may question, then, whether the values which inhere in state autonomy, in general, to develop legal doctrine can be found in the case of the "true conflict," in which state policies are in conflict with each other and in which it is possible to choose only one to govern. If the governing policy is to be selected by a choice "which would either reflect relevant multistate policies or provide the basis for a reasonable accommodation of the laws' conflicting purposes"⁶³ there would be no stronger reason for state autonomy to make that decision, as distinguished from the decision being controlled by federal law, than there would be for state autonomy to determine, for example, whether a specific state policy creates an unreasonable burden on interstate commerce.

Professor Cavers, in defending *Klaxon*, suggests that today's expanded bases of jurisdiction for state courts provide an answer to the contention that choice-of-law rules developed by the federal courts are desirable in order to avoid the possibility of conflicts of state choice-of-law doctrine which can result in different state courts applying differing governing laws to the same transaction. Professor Cavers suggests that expanded bases of jurisdiction provide an opportunity for states to assure that their policies will be given effect, and for plaintiffs to neutralize the fact that other state courts would reach a different result if they had jurisdiction.⁶⁴ It is difficult to follow this argument; if anything, expanded bases of jurisdiction, by increasing the opportunities for forum shopping, would make even more likely the possibility of different conclusions being reached, from state to state, about the legal aspects of the same transaction. Professor Cavers seems to be saying that wider opportunities for forum shopping will somehow eliminate the evils of forum shopping. I should think that expanded bases of jurisdiction of state courts would make even more desirable the recognition of

⁶² *Id.* at 73, 77, 78.

⁶³ CAVERS, *op. cit. supra* note 4, at 64.

⁶⁴ *Id.* at 219.

choice of law as federal in origin. Another puzzling aspect of the relationship of bases of jurisdiction to choice of law is suggested by Professor Cavers' comment about *Griffin v. McCoach*,⁶⁵ in which the federal court had nationwide jurisdiction in interpleader. There has been general criticism of the Supreme Court's application of *Klaxon* in the case, requiring the federal court to apply the same choice-of-law rule state courts in that state would apply in a situation where the same suit could not have been brought in the state courts because they did not have as expansive a basis of jurisdiction. Professor Cavers argues that in such a case the federal court should be free to declare a choice-of-law principle regardless of the choice-of-law doctrine of the courts of the state in which the federal court is sitting.⁶⁶ If federal courts had nationwide jurisdiction, he says, "the command of *Klaxon* would no longer be reasonable."⁶⁷ But what would be the effect on state autonomy to determine the reach of state law where the command of *Klaxon* would "no longer be reasonable"? Professor Cavers appears to be saying that the accident of whether Congress limits the jurisdiction of federal courts by state boundaries will determine the answer to the fundamental question whether the authoritative source of choice-of-law doctrine is federal or state law. The anomaly of *Griffin v. McCoach* highlights the desirability of considering that source to be federal.

Professor Cavers refers also to the "actualities" of the federal system in contending that *Klaxon* should not be overruled.⁶⁸ For example, he refers to the need for a supreme court to have ultimate authority with respect to choice-of-law rules declared by federal courts, and states that the Supreme Court would not have jurisdiction to review such nonconstitutional decisions. But if choice-of-law doctrine were federal common law the Supreme Court would perform this role. Professor Cavers expresses concern about federal and state courts having different choice-of-law rules if *Klaxon* were overruled; this would not be so if choice of law were federal in source, and therefore binding on all courts, federal and state.⁶⁹ And Professor Cavers raises the question whether the Supreme Court could effectively handle the choice-of-law case load which a contra-*Klaxon* result would create.⁷⁰ Perhaps one of the most significant

⁶⁵ 313 U.S. 498 (1941).

⁶⁶ CAVERS, *op. cit. supra* note 4, at 223. See also ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 35 (Tent. Draft No. 1, 1963).

⁶⁷ CAVERS, *op. cit. supra* note 4, at 220 n.39.

⁶⁸ *Id.* at 220-22.

⁶⁹ See also Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 541, 559-62 (1958).

⁷⁰ "In view of the highly selective nature of the Court's exercise of jurisdiction and the great national importance of most of the problems with which it chooses

contributions of current thinking in conflict of laws will be to make possible better estimates of what the practicalities would be if the Supreme Court were to assume the role of declaring all choice-of-law doctrine for the nation. For it might well be that a relatively small number of cases could result in declaration of principles operative as effective guides to the state courts and lower federal courts which would be the first line developers of the legal doctrine. How many cases would be necessary, for example, for useful articulation of the principles of facilitating multistate activities and seeking for accommodation of conflicting interests by considering the degrees of impairment of state policies if those policies were not given effect in a specific case? How clear is it that the Supreme Court could not effectively monitor the development by state and federal courts of federal choice-of-law principles if those principles were to be developed in the direction provided by current thinking?⁷¹

IV

If, in resolving a conflict of state laws, a "court is to seek a rule for choice of law . . . which would either reflect relevant multistate policies or provide the basis for a reasonable accommodation of the laws' conflicting purposes,"⁷² a supreme federal law of conflict of laws should in theory be the source of the choice-of-law rule. It is not likely, however, that the principle of a federal common law of choice of law can come to prevail, given the historical development of choice of law as state law and the reluctance of the Supreme Court to develop constitutional doctrine for the resolution of conflicts of state laws.⁷³ But the inquiry undertaken in this essay

to deal, the Court should not clog its docket with private litigation involving choice-of-law questions." CAVERS, *op. cit. supra* note 4, at 221 n.40. It seems surprising that Professor Cavers would characterize choice-of-law cases as "private litigation" without "national importance" if such cases are to be decided by seeking a "rule for choice of law or a principle of preference which would either reflect relevant multistate policies or provide the basis for a reasonable accommodation of the laws' conflicting purposes." *Id.* at 64. With respect to whether the Court would "clog its docket," compare Professor Cavers' statement that "How choice-of-law cases are decided is not going to upset basic values on any pervasive scale: the cases are few and their impact is limited. In many respects, the field is unique." *Id.* at 14.

⁷¹ See Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 560 (1926): "Such an objection [that the Court would be unduly burdened if all questions of conflict of laws were issues of constitutional law] would lose much of its force if it could be demonstrated that the only review permitted is discretionary review. . . ."

⁷² CAVERS, *op. cit. supra* note 4, at 64 (1965).

⁷³ See Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 675 (1959): "There will remain the inevitable problem in a federal system that recurrently competing state interests in a conflicts case may have to be evaluated in the light of the national interest in interstate harmony. It is the classic political problem

nevertheless seems worthwhile making. Even if the source of conflicts doctrine continues to be state law, the fact that there is a case to be made for developing, instead, a federal common law of choice of law should be a factor in the development by state courts of their conflicts doctrine. Though the federal common law of conflict of laws might never make its way as such into decisions of courts, state courts might well incorporate the content of such federal law into their choice-of-law decisions by asking whether a prospective solution to a problem of true conflict would be the soundest solution if it were supreme federal law instead of state law. That inquiry would focus attention on the most creative current thinking in conflicts and would lead to state choice-of-law doctrine which would best respond to the needs of the federal system.

of weighing, adjusting, and harmonizing diverse community values, which is ultimately the responsibility of Congress. No wonder the Supreme Court is now disentangling itself therefrom after some unhappy efforts to elevate choice-of-law rules to constitutional rank. . . . For some time to come . . . the main responsibility for the rational development of conflict of laws is bound to remain with the state courts."

APPENDIX III

STATISTICAL TABLES

RESIDENCES OF PARTIES IN DIVERSITY OF CITIZENSHIP CASES COMMENCED IN THE UNITED STATES DISTRICT COURTS FISCAL YEAR 1970 BY DISTRICT

Total		Plaintiff	Defendant	Original	Removed	Total
1.	Resident		Non res. corp. doing business in state			
2.	Resident		Non res. corp. not doing business in state			
3.	Resident		Other non resident			
4.	Non res. corp. doing business in state		Resident			
5.	Non res. corp. not doing business in state		Resident			
6.	Other non resident		Resident			
7.	Non res. corp. doing business in state		Non res. corp. doing business in state			
8.	Non res. corp. doing business in state		Non res. corp. not doing business in state			
9.	Non res. corp. doing business in state		Other non resident			
10.	Non res. corp. not doing business in state		Non res. corp. doing business in state			
11.	Other non resident		Non res. corp. doing business in state			
12.	Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13.	Non res. corp. not doing business in state		Other non resident			
14.	Other non resident		Non res. corp. not doing business in state			
15.	Other non resident		Other non resident			
16.	Resident		Resident			
17.	Unknown					

These — cases are eliminated by S. 1876.

These — cases are shifted to the state courts, but remain removable. The cases affected total —.

Source: Administrative Office of the United States Courts.

MANA-MULIANTS

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	110*	39*	149
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	12*	7	19
3. Resident	Other non resident	Other non resident	37*	14	51
4. Non res. corp. doing business in state	Resident	Resident	4*	5	54
5. Non res. corp. not doing business in state	Resident	Resident	9	9	9
6. Other non resident	Resident	Resident	39	1	40
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	5*	1*	6
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state	1*	1	2
9. Non res. corp. doing business in state	Other non resident	Other non resident			2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	2		4
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	4		
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident	3		3
16. Resident	Resident	Resident	10*	1	11
17. Unknown					

* These 214 cases are eliminated by S. 1876.

† These 50 cases are shifted to the state courts, but remain removable. The cases affected total 264.

Source: Administrative Office of the United States Courts.

NEW HAMPSHIRE

Plaintiff		Defendant		Original	Removed	Total
Total						
1.	Resident	Non res. corp. doing business in state	11*	2*	13	
2.	Resident	Non res. corp. not doing business in state	15†	4	19	
3.	Resident	Other non resident	5†	2	7	
4.	Non res. corp. doing business in state	Resident	5*		5	
5.	Non res. corp. not doing business in state	Resident	2		2	
6.	Other non resident	Resident	39	2	41	
7.	Non res. corp. doing business in state	Non res. corp. doing business in state				
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state				
9.	Non res. corp. doing business in state	Other non resident				
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state				
11.	Other non resident	Non res. corp. doing business in state	4		4	
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state				
13.	Non res. corp. not doing business in state	Other non resident				
14.	Other non resident	Non res. corp. not doing business in state	1		1	
15.	Other non resident	Other non resident	1		1	
16.	Resident	Resident	2*		2	
17.	Unknown					

* These 20 cases are eliminated by S. 1876.

† These 20 cases are shifted to the state courts, but remain removable. The cases affected total 40.

Source: Administrative Office of the United States Courts.

RHODE ISLAND

511

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	5 ^a	1 ^b	6
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1 ^a	1 ^b	1
3. Resident	Other non resident	Other non resident	16 ^a	7	23
4. Non res. corp. doing business in state	Resident	Resident			
5. Non res. corp. not doing business in state	Resident	Resident			
6. Other non resident	Resident	Resident	40		40
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident	2 ^a		2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	1		1
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident	3	1	4
16. Resident	Resident	Resident	1 ^b		1
17. Unknown					

^a These 7 cases are eliminated by S. 1876.

^b These 19 cases are shifted to the state courts, but remain removable. The cases affected total 26.

Source: Administrative Office of the United States Courts.

PUERTO RICO

Plaintiff		Defendant		Original Removed Total	
Total					
1.	Resident	Non res. corp. doing business in state	95*	6*	101
2.	Resident	Non res. corp. not doing business in state	58 [†]	6	64
3.	Resident	Other non resident	129 [†]	7	136
4.	Non res. corp. doing business in state	Resident	4*	1	5
5.	Non res. corp. not doing business in state	Resident	13		13
6.	Other non resident	Resident			
7.	Non res. corp. doing business in state	Non res. corp. doing business in state			
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9.	Non res. corp. doing business in state	Other non resident	1 [†]		1
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state		2	2
11.	Other non resident	Non res. corp. doing business in state		6	6
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state		1	1
13.	Non res. corp. not doing business in state	Other non resident			
14.	Other non resident	Non res. corp. not doing business in state	3		3
15.	Other non resident	Other non resident	1		1
16.	Resident	Resident	2*		2
17.	Unknown				

* These 107 cases are eliminated by S. 1876.

† These 188 cases are shifted to the state courts, but remain removable. The cases affected total 295.

Source: Administrative Office of the United States Courts.

CONNECTICUT

Plaintiff		Defendant	Original	Removed	Total
Total					
1.	Resident	Non res. corp. doing business in state	18*	5*	23
2.	Resident	Non res. corp. not doing business in state	29 †	6	35
3.	Resident	Other non resident	21 †	1	22
4.	Non res. corp. doing business in state	Resident	4*		4
5.	Non res. corp. not doing business in state	Resident	20		20
6.	Other non resident	Resident	67	1	68
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	2*	2*	4
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state	1†		1
9.	Non res. corp. doing business in state	Other non resident			
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state		1*	1
11.	Other non resident	Non res. corp. doing business in state	4		4
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
13.	Non res. corp. not doing business in state	Other non resident	2		2
14.	Other non resident	Non res. corp. not doing business in state	1		1
15.	Other non resident	Other non resident	6	1	7
16.	Resident	Resident			
17.	Unknown				

* These 32 cases are eliminated by S. 1876.

† These 51 cases are shifted to the state courts, but remain removable. The cases affected total 83.

Source: Administrative Office of the United States Courts.

NEW YORK - NORTH

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	17*	6 *	23
2. Resident		Non res. corp. not doing business in state	2 [†]		2
3. Resident		Other non resident	13 [†]	3	16
4. Non res. corp. doing business in state		Resident			
5. Non res. corp. not doing business in state		Resident	10*	1	11
6. Other non resident		Resident	32		32
7. Non res. corp. doing business in state		Non res. corp. doing business in state			
8. Non res. corp. doing business in state		Non res. corp. not doing business in state			
9. Non res. corp. doing business in state		Other non resident	1 [†]		1
10. Non res. corp. not doing business in state		Non res. corp. doing business in state			
11. Other non resident		Non res. corp. doing business in state	1		1
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident			
14. Other non resident		Non res. corp. not doing business in state	4		4
15. Other non resident		Other non resident	2		2
16. Resident		Resident			
17. Unknown					

* These 33 cases are eliminated by S. 1876.

† These 16 cases are shifted to the state courts, but remain removable. The cases affected total 49.

Source: Administrative Office of the United States Courts.

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	149*	3*	152
2. Resident		Non res. corp. not doing business in state	22†		22
3. Resident		Other non resident	82‡	1	83
4. Non res. corp. doing business in state	Resident		21*		21
5. Non res. corp. not doing business in state	Resident		10		10
6. Other non resident	Resident		107		107
7. Non res. corp. doing business in state	Non res. corp. doing business in state		1*		1
8. Non res. corp. doing business in state	Non res. corp. not doing business in state		4†		4
9. Non res. corp. doing business in state	Other non resident		2‡		2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state				
11. Other non resident	Non res. corp. doing business in state		2		2
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state				
13. Non res. corp. not doing business in state	Other non resident				
14. Other non resident	Non res. corp. not doing business in state		1		1
15. Other non resident	Other non resident		1		1
16. Resident	Resident				
17. Unknown					

* These 174 cases are eliminated by S. 1876.

† These 110 cases are shifted to the state courts, but remain removable. The cases affected total 28†.

Source: Administrative Office of the United States Courts.

NEW YORK - SOUTH

Plaintiff		Defendant		Original Removed Total	
Total					
1.	Resident	Non res. corp. doing business in state	456*	27*	483
2.	Resident	Non res. corp. not doing business in state	46 †	2	48
3.	Resident	Other non resident	161 †	38	199
4.	Non res. corp. doing business in state	Resident	13*	3	16
5.	Non res. corp. not doing business in state	Resident	12		12
6.	Other non resident	Resident	324	6	330
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	9*		9
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state	4 †		4
9.	Non res. corp. doing business in state	Other non resident	3 †	1	4
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state	14		14
11.	Other non resident	Non res. corp. doing business in state	175	7*	182
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state	3		3
13.	Non res. corp. not doing business in state	Other non resident	4		4
14.	Other non resident	Non res. corp. not doing business in state	8		8
15.	Other non resident	Other non resident	15		15
16.	Resident	Resident	14*		14
17.	Unknown		1	1	

* These 526 cases are eliminated by S. 1876.

† These 214 cases are shifted to the state courts, but remain removable. The cases affected total 740.

Source: Administrative Office of the United States Courts.

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	22*	9*	31
2. Resident		Non res. corp. not doing business in state	5†	4	9
3. Resident		Other non resident	13†	8	21
4. Non res. corp. doing business in state		Resident	9*		9
5. Non res. corp. not doing business in state		Resident	2		2
6. Other non resident		Resident	24	1	25
7. Non res. corp. doing business in state		Non res. corp. doing business in state			
8. Non res. corp. doing business in state		Non res. corp. not doing business in state	1†		1
9. Non res. corp. doing business in state		Other non resident			
10. Non res. corp. not doing business in state		Non res. corp. doing business in state			
11. Other non resident		Non res. corp. doing business in state	3		3
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident			
14. Other non resident		Non res. corp. not doing business in state	1		1
15. Other non resident		Other non resident			
16. Resident		Resident			
17. Unknown					

* These 40 cases are eliminated by S. 1876.

† These 19 cases are shifted to the state courts, but remain removable. The cases affected total 59.

Source: Administrative Office of the United States Courts.

VERMONT

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	20*		20
2. Resident		Non res. corp. not doing business in state	8 [†]		8
3. Resident		Other non resident	73 [†]		73
4. Non res. corp. doing business in state		Resident	1*		1
5. Non res. corp. not doing business in state		Resident	3	1	4
6. Other non resident		Resident	117		117
7. Non res. corp. doing business in state		Non res. corp. doing business in state	1*		1
8. Non res. corp. doing business in state		Non res. corp. not doing business in state	2 [†]		2
9. Non res. corp. doing business in state		Other non resident			
10. Non res. corp. not doing business in state		Non res. corp. doing business in state			
11. Other non resident		Non res. corp. doing business in state	11		11
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident			
14. Other non resident		Non res. corp. not doing business in state	2		2
15. Other non resident		Other non resident	19		19
16. Resident		Resident	2*	1	3
17. Unknown					

* These 24 cases are eliminated by S. 1876.

† These 83 cases are shifted to the state courts, but remain removable. The cases affected total 107.

Source: Administrative Office of the United States Courts.

DELAWARE

Total	Plaintiff	Defendant	Original	Removed	Total
1.	Resident	Non res. corp. doing business in state	7*		7
2.	Resident	Non res. corp. not doing business in state	4†		4
3.	Resident	Other non resident	7‡		7
4.	Non res. corp. doing business in state	Resident			
5.	Non res. corp. not doing business in state	Resident	2		2
6.	Other non resident	Resident	35	1	36
7.	Non res. corp. doing business in state	Non res. corp. doing business in state			
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9.	Non res. corp. doing business in state	Other non resident			
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state			
11.	Other non resident	Non res. corp. doing business in state	3		3
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13.	Non res. corp. not doing business in state	Other non resident			
14.	Other non resident	Non res. corp. not doing business in state	2		2
15.	Other non resident	Other non resident	4		4
16.	Resident	Resident	1‡		1
17.	Unknown				

These 8 cases are eliminated by S. 1876.

† These 11 cases are shifted to the state courts, but remain removable. The cases affected total 19.

Source: Administrative Office of the United States Courts.

NEW JERSEY

Plaintiff		Defendant		Original	Removed	Total
Total						
1.	Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	70*	58*	128
2.	Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	11 ^p	1	12
3.	Resident	Other non resident	Other non resident	56 ^p	8	64
4.	Non res. corp. doing business in state	Resident	Resident	45*	4	49
5.	Non res. corp. not doing business in state	Resident	Resident	6		6
6.	Other non resident	Resident	Resident	223	4	227
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	4*	2*	6
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1 ^p	1	2
9.	Non res. corp. doing business in state	Other non resident	Other non resident			
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1		1
11.	Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	29	6*	35
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13.	Non res. corp. not doing business in state	Other non resident	Other non resident			
14.	Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	21	1	22
15.	Other non resident	Other non resident	Other non resident			
16.	Resident	Resident	Resident	3*		3
17.	Unknown					

* These 188 cases are eliminated by S. 1876.

† These 67 cases are shifted to the state courts, but remain removable. The cases affected total 255.

Source: Administrative Office of the United States Courts.

PENNSYLVANIA - EAST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	460*	18*	478
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	89 †	3	92
3. Resident	Other non resident	Other non resident	204 †	5	209
4. Non res. corp. doing business in state	Resident	Resident	78*	4	82
5. Non res. corp. not doing business in state	Resident	Resident	20		20
6. Other non resident	Resident	Resident	286		286
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	4*		4
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	5 †		5
9. Non res. corp. doing business in state	Other non resident	Other non resident	2 †		2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	3		3
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	49		49
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	7		7
15. Other non resident	Other non resident	Other non resident	7		7
16. Resident	Resident	Resident	19*	3	22
17. Unknown			1		1

* These 579 cases are eliminated by S. 1876.

† These 300 cases are shifted to the state courts, but remain removable. The cases affected total 879.

Source: Administrative Office of the United States Courts.

PENNSYLVANIA - MIDDLE

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	33*		33
2. Resident		Non res. corp. not doing business in state	6 ⁹		6
3. Resident		Other non resident	87 ⁹	3	90
4. Non res. corp. doing business in state	Resident		1*		1
5. Non res. corp. not doing business in state	Resident				
6. Other non resident	Resident		81	1	82
7. Non res. corp. doing business in state	Non res. corp. doing business in state		2*		2
8. Non res. corp. doing business in state	Non res. corp. not doing business in state				
9. Non res. corp. doing business in state	Other non resident				
10. Non res. corp. not doing business in state	Non res. corp. doing business in state		1		1
11. Other non resident	Non res. corp. doing business in state		3		3
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state		1		1
13. Non res. corp. not doing business in state	Other non resident				
14. Other non resident	Non res. corp. not doing business in state		6		6
15. Other non resident	Other non resident				
16. Resident	Resident				
17. Unknown					

* These 36 cases are eliminated by S. 1876.

⁹ These 93 cases are shifted to the state courts, but remain removable. The cases affected total 129.

Source: Administrative Office of the United States Courts.

PENNSYLVANIA - WEST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	184*	13*	197
2. Resident		Non res. corp. not doing business in state	24*		24
3. Resident		Other non resident	95†	1	96
4. Non res. corp. doing business in state		Resident	38*		38
5. Non res. corp. not doing business in state		Resident	16		16
6. Other non resident		Resident	156		156
7. Non res. corp. doing business in state		Non res. corp. doing business in state	2*		2
8. Non res. corp. doing business in state		Non res. corp. not doing business in state	1 †		1
9. Non res. corp. doing business in state		Other non resident	3 †		3
10. Non res. corp. not doing business in state		Non res. corp. doing business in state	3		3
11. Other non resident		Non res. corp. doing business in state	20		20
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident			
14. Other non resident		Non res. corp. not doing business in state	2		2
15. Other non resident		Other non resident	27		27
16. Resident		Resident			
17. Unknown					

* These 237 cases are eliminated by S. 1876.

† These 123 cases are shifted to the state courts, but remain removable. The cases affected total 360.

Source: Administrative Office of the United States Courts.

MARYLAND

Total	Plaintiff	Defendant	Original Removed Total	
1. Resident		Non res. corp. doing business in state	75*	22*
2. Resident		Non res. corp. not doing business in state	5 †	1
3. Resident		Other non resident	29 †	2
				31
4. Non res. corp. doing business in state	Resident		47*	1
5. Non res. corp. not doing business in state	Resident		5	5
6. Other non resident	Resident		108	2
				110
7. Non res. corp. doing business in state		Non res. corp. doing business in state	5*	5
8. Non res. corp. doing business in state		Non res. corp. not doing business in state	1 †	1
9. Non res. corp. doing business in state		Other non resident	5 †	5
10. Non res. corp. not doing business in state		Non res. corp. doing business in state	13	3*
11. Other non resident		Non res. corp. doing business in state		16
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state		
13. Non res. corp. not doing business in state		Other non resident		
14. Other non resident		Non res. corp. not doing business in state	9	9
15. Other non resident		Other non resident		
16. Resident		Resident	1*	1
17. Unknown				

* These 153 cases are eliminated by S. 1876.

† These 40 cases are shifted to the state courts, but remain removable. The cases affected total 193.

Source: Administrative Office of the United States Courts.

NORTH CAROLINA - EAST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	47*	5*	52
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1*	1	2
3. Resident	Other non resident	Other non resident	13*	10	23
4. Non res. corp. doing business in state	Resident	Resident	12*		12
5. Non res. corp. not doing business in state	Resident	Resident	1		1
6. Other non resident	Resident	Resident	38		38
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1*		1
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state	2*		2
9. Non res. corp. doing business in state	Other non resident	Other non resident		1	1
10. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. doing business in state			
11. Other non resident	Other non resident	Non res. corp. doing business in state	4		4
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Other non resident	Non res. corp. not doing business in state	1		1
15. Other non resident	Other non resident	Other non resident	5	2	7
16. Resident	Resident	Resident	3*		3
17. Unknown	Unknown				

* These 68 cases are eliminated by S. 1876.

* These 16 cases are shifted to the state courts, but remain removable. The cases affected total 84.

Source: Administrative Office of the United States Courts.

NORTH CAROLINA - MIDDLE

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	15*	4*	19
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	4†	2	6
3. Resident	Other non resident	Other non resident	6†	6	6
4. Non res. corp. doing business in state	Resident	Resident	7*		7
5. Non res. corp. not doing business in state	Resident	Resident	1		1
6. Other non resident	Other non resident	Other non resident	12		12
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	6		6
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident	3		3
16. Resident	Resident	Resident	1*		1
17. Unknown					

* These 27 cases are eliminated by S. 1876.

† These 10 cases are shifted to the state courts, but remain removable. The cases affected total 37.

Source: Administrative Office of the United States Courts.

Total		Plaintiff	Defendant	Original Removed Total		
1.	Resident		Non res. corp. doing business in state	23*	15*	38
2.	Resident		Non res. corp. not doing business in state	6 ^p	2	8
3.	Resident		Other non resident	4 ^p	6	10
4.	Non res. corp. doing business in state		Resident	12*		12
5.	Non res. corp. not doing business in state		Resident	4		4
6.	Other non resident		Resident	29	1	30
7.	Non res. corp. doing business in state		Non res. corp. doing business in state	4 *	3*	7
8.	Non res. corp. doing business in state		Non res. corp. not doing business in state			
9.	Non res. corp. doing business in state		Other non resident	1 ^p		1
10.	Non res. corp. not doing business in state		Non res. corp. doing business in state	4	3*	7
11.	Other non resident		Non res. corp. doing business in state	8	1*	9
12.	Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13.	Non res. corp. not doing business in state		Other non resident			
14.	Other non resident		Non res. corp. not doing business in state	2	1	3
15.	Other non resident		Other non resident			
16.	Resident		Resident			
17.	Unknown					

* These 91 cases are eliminated by S. 1876.

† These 11 cases are shifted to the state courts, but remain removable. The cases affected total 72.

Source: Administrative Office of the United States Courts.

SOUTH CAROLINA

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	160*	43*	203
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	5 ^p	1	6
3. Resident	Other non resident	Other non resident	88 ^p	21	109
4. Non res. corp. doing business in state	Resident	Resident	54*		54
5. Non res. corp. not doing business in state	Resident	Resident	3		3
6. Other non resident	Other non resident	Other non resident	97	1	98
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	4*	2*	6
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state	2 ^p		2
9. Non res. corp. doing business in state	Other non resident	Other non resident	1 ^p		1
10. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. doing business in state			
11. Other non resident	Other non resident	Non res. corp. doing business in state	12	1*	13
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
15. Other non resident	Other non resident	Other non resident	16	4	20
16. Resident	Resident	Resident		2	2
17. Unknown					

* These 264 cases are eliminated by S. 1876.

^p These 96 cases are shifted to the state courts, but remain removable. The cases affected total 360.

Source: Administrative Office of the United States Courts.

Total		Plaintiff	Defendant	Original	Removed	Total
1.	Resident		Non res. corp. doing business in state	176*	23*	199
2.	Resident		Non res. corp. not doing business in state	3 [†]	1	4
3.	Resident		Other non resident	105 [†]	12	117
4.	Non res. corp. doing business in state	Resident		24*	1	25
5.	Non res. corp. not doing business in state	Resident		2		2
6.	Other non resident	Resident		144	2	146
7.	Non res. corp. doing business in state		Non res. corp. doing business in state	5*	1*	6
8.	Non res. corp. doing business in state		Non res. corp. not doing business in state	1 [†]		1
9.	Non res. corp. doing business in state		Other non resident			
10.	Non res. corp. not doing business in state		Non res. corp. doing business in state	1		1
11.	Other non resident		Non res. corp. doing business in state	13		13
12.	Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13.	Non res. corp. not doing business in state		Other non resident			
14.	Other non resident		Non res. corp. not doing business in state	1		1
15.	Other non resident		Other non resident	26	4	30
16.	Resident		Resident	2*		2
17.	Unknown					

* These 231 cases are eliminated by S. 1876.

† These 109 cases are shifted to the state courts, but remain removable. The cases affected total 340.

Source: Administrative Office of the United States Courts.

VIRGINIA - WEST

Plaintiff		Defendant	Original Removed Total	
Total				
1. Resident	Non res. corp. doing business in state		41*	6*
2. Resident	Non res. corp. not doing business in state		4†	4
3. Resident	Other non resident		34†	14
				48
4. Non res. corp. doing business in state	Resident		12*	12
5. Non res. corp. not doing business in state	Resident			
6. Other non resident	Resident		46	46
7. Non res. corp. doing business in state	Non res. corp. doing business in state		1*	1
8. Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident		3†	3
10. Non res. corp. not doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state		2	2
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident			
14. Other non resident	Non res. corp. not doing business in state			
15. Other non resident	Other non resident		5	1
				6
16. Resident	Resident			
17. Unknown				

* These 61 cases are eliminated by S. 1876.

† These 41 cases are shifted to the state courts, but remain removable. The cases affected total 102.

Source: Administrative Office of the United States Courts.

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	8*	5*	13
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	3†	2	5
3. Resident	Other non resident	Other non resident	6†	8	14
4. Non res. corp. doing business in state	Resident	Resident	5*	2	7
5. Non res. corp. not doing business in state	Resident	Resident	1	1	1
6. Other non resident	Resident	Resident	26	3	29
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	3*	3	3
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	2	2	2
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	2	1†	3
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	7	7	7
15. Other non resident	Other non resident	Other non resident			
16. Resident	Resident	Resident	1*	1	1
17. Unknown	Unknown				

* These 23 cases are eliminated by S. 1876.

† These 9 cases are shifted to the state courts, but remain removable. The cases affected total 32.

Source: Administrative Office of the United States Courts.

WEST VIRGINIA - SOUTH

Plaintiff		Defendant		Original	Removed	Total
Total						
1. Resident	Non res. corp. doing business in state	43*	61*	104		
2. Resident	Non res. corp. not doing business in state	10*	13	23		
3. Resident	Other non resident	16*	16	32		
4. Non res. corp. doing business in state	Resident	9*	1	10		
5. Non res. corp. not doing business in state	Resident	3		3		
6. Other non resident	Resident	36	2	38		
7. Non res. corp. doing business in state	Non res. corp. doing business in state	2*	2*	4		
8. Non res. corp. doing business in state	Non res. corp. not doing business in state					
9. Non res. corp. doing business in state	Other non resident	1*		1		
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	1		1		
11. Other non resident	Non res. corp. doing business in state	10	1*	11		
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state					
13. Non res. corp. not doing business in state	Other non resident	1		1		
14. Other non resident	Non res. corp. not doing business in state					
15. Other non resident	Other non resident	4	1	5		
16. Resident	Resident	1*		1		
17. Unknown						

* These 119 cases are eliminated by S. 1876.

† These 27 cases are shifted to the state courts, but remain removable. The cases affected total 146.

Source: Administrative Office of the United States Courts.

Plaintiff		Defendant		Original Removed Total	
Total					
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	110*	91*	201
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	3 ^p		3
3. Resident	Other non resident	Other non resident	23 ^p	57	80
4. Non res. corp. doing business in state	Resident	Resident	84*		84
5. Non res. corp. not doing business in state	Resident	Resident	2		2
6. Other non resident	Resident	Resident	62		62
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	12*	2*	14
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident	2 ^p		2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1		1
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	6	3*	9
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
13. Non res. corp. not doing business in state	Other non resident	Other non resident	1		1
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident	4	2	6
16. Resident	Resident	Resident		1	1
17. Unknown					

* These 302 cases are eliminated by S. 1876.

^p These 28 cases are shifted to the state courts, but remain removable. The cases affected total 330.

Source: Administrative Office of the United States Courts.

ALABAMA - MIDDLE

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	30*	15*	45
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	2†	1	3
3. Resident	Other non resident	Other non resident	12†	2	14
4. Non res. corp. doing business in state	Resident	Resident	15*		15
5. Non res. corp. not doing business in state	Resident	Resident			
6. Other non resident	Resident	Resident	37		37
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	3*		3
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	17		17
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	3	1	4
15. Other non resident	Other non resident	Other non resident	1*	1	2
16. Resident	Resident	Resident			
17. Unknown					

* These 64 cases are eliminated by S. 1876.

† These 14 cases are shifted to the state courts, but remain removable. The cases affected total 78.

Source: Administrative Office of the United States Courts.

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	47*	42*	89
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	16†	7	23
3. Resident	Other non resident	Other non resident	7†	5	12
4. Non res. corp. doing business in state	Resident	Resident	8*	1	9
5. Non res. corp. not doing business in state	Resident	Resident	2		2
6. Other non resident	Resident	Resident	19		19
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	3		3
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	5	1*	6
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	3		3
15. Other non resident	Other non resident	Other non resident			
16. Resident	Resident	Resident			
17. Unknown					

* These 98 cases are eliminated by S. 1876.

† These 23 cases are shifted to the state courts, but remain removable. The cases affected total 121.

Source: Administrative Office of the United States Courts.

FLORIDA - NORTH

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	14*	14*	28
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1†	1	1
3. Resident	Other non resident	Other non resident	6†	3	9
4. Non res. corp. doing business in state	Resident	Resident	3*	3	3
5. Non res. corp. not doing business in state	Resident	Resident	3	3	3
6. Other non resident	Resident	Resident	9	9	9
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	2*	2	2
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	4	4	4
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state			
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident	1	1	1
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	4	4	4
15. Other non resident	Other non resident	Other non resident			
16. Resident	Resident	Resident			
17. Unknown					

* These 33 cases are eliminated by S. 1876.

† These 7 cases are shifted to the state courts, but remain removable. The cases affected total 40.

Source: Administrative Office of the United States Courts.

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	62*	23*	85
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	11 ^p	4	15
3. Resident	Other non resident	Other non resident	4 ^p	2	6
4. Non res. corp. doing business in state	Resident	Resident	40*		40
5. Non res. corp. not doing business in state	Resident	Resident	21		21
6. Other non resident	Resident	Resident	38	1	39
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	3*		3
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1 ^p	2	3
9. Non res. corp. doing business in state	Other non resident	Other non resident	2 ^p		2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	8		8
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident	1		1
16. Resident	Resident	Resident	1*		1
17. Unknown					

* These 129 cases are eliminated by S. 1876.

^p These 18 cases are shifted to the state courts, but remain removable. The cases affected total 147.

Source: Administrative Office of the United States Courts.

FLORIDA - SOUTH

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	50*	19*	69
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	27 †	29	56
3. Resident	Other non resident	Other non resident	11 †	12	23
4. Non res. corp. doing business in state	Resident	Resident	24*	1	25
5. Non res. corp. not doing business in state	Resident	Resident	78	2	80
6. Other non resident	Resident	Resident	41	1	42
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1*	1*	2
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state	8	2	5
9. Non res. corp. doing business in state	Non res. corp. doing business in state	Other non resident	8	1	4
10. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. doing business in state	2	2	2
11. Other non resident	Non res. corp. not doing business in state	Non res. corp. doing business in state	16	2*	18
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident	2	2	2
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	5	5	5
15. Other non resident	Other non resident	Other non resident			
16. Resident	Resident	Resident			
17. Unknown					

* These 97 cases are eliminated by S. 1876.

† These 44 cases are shifted to the state courts, but remain removable. The cases affected total 141.

Source: Administrative Office of the United States Courts.

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	80*	35*	115
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	11†	5	16
3. Resident	Other non resident	Other non resident	25†	25	50
4. Non res. corp. doing business in state	Resident	Resident	40*		40
5. Non res. corp. not doing business in state	Resident	Resident	12		12
6. Other non resident	Resident	Resident	95	1	96
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	7*	2*	9
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state		1	1
9. Non res. corp. doing business in state	Other non resident	Other non resident	7†		7
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	3	1*	4
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	18	1*	19
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident		1	1
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident	†		†
16. Resident	Resident	Resident	2*		2
17. Unknown					

* These 168 cases are eliminated by S. 1876.

† These 43 cases are shifted to the state courts, but remain removable. The cases affected total 211.

Source: Administrative Office of the United States Courts.

GEORGIA - MIDDLE

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	28*	22*	50
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	3†		3
3. Resident	Other non resident	Other non resident	9†	8	17
4. Non res. corp. doing business in state	Resident	Resident	16*		16
5. Non res. corp. not doing business in state	Resident	Resident	1		1
6. Other non resident	Resident	Resident	47		47
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	4		4
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident			
16. Resident	Resident	Resident			
17. Unknown					

* These 66 cases are eliminated by S. 1876.

† These 12 cases are shifted to the state courts, but remain removable. The cases affected total 78.

Source: Administrative Office of the United States Courts.

GEORGIA - SOUTH

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	18*	13*	31
2. Resident		Non res. corp. not doing business in state		1	1
3. Resident		Other non resident	6.8	23	29
4. Non res. corp. doing business in state		Resident	16*	1	17
5. Non res. corp. not doing business in state		Resident	4		4
6. Other non resident		Resident	32		32
7. Non res. corp. doing business in state		Non res. corp. doing business in state	3*	1*	4
8. Non res. corp. doing business in state		Non res. corp. not doing business in state	29		2
9. Non res. corp. doing business in state		Other non resident			
10. Non res. corp. not doing business in state		Non res. corp. doing business in state			6
11. Other non resident		Non res. corp. doing business in state	6		
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident			
14. Other non resident		Non res. corp. not doing business in state	4		4
15. Other non resident		Other non resident			
16. Resident		Resident	2*		2
17. Unknown					

* These 53 cases are eliminated by S. 1876.

† These 2 cases are shifted to the state courts, but remain removable. The cases affected total 61.

Source: Administrative Office of the United States Courts.

LOUISIANA - EAST

Total		Plaintiff	Defendant	Original Removed Total	
1.	Resident		Non res. corp. doing business in state	280*	33*
2.	Resident		Non res. corp. not doing business in state	36 [†]	3
3.	Resident		Other non resident	59 [†]	6
4.	Non res. corp. doing business in state	Resident		44*	2
5.	Non res. corp. not doing business in state	Resident		7	7
6.	Other non resident	Resident		80	1
7.	Non res. corp. doing business in state		Non res. corp. doing business in state	17*	3*
8.	Non res. corp. doing business in state		Non res. corp. not doing business in state	2 [†]	2
9.	Non res. corp. doing business in state		Other non resident	1 [†]	1
10.	Non res. corp. not doing business in state		Non res. corp. doing business in state	3	3
11.	Other non resident		Non res. corp. doing business in state	85	85
12.	Non res. corp. not doing business in state		Non res. corp. not doing business in state	1	1
13.	Non res. corp. not doing business in state		Other non resident		
14.	Other non resident		Non res. corp. not doing business in state	8	1
15.	Other non resident		Other non resident	3	3
16.	Resident				
17.	Unknown		Resident	2*	2

* These 379 cases are eliminated by S. 1876.

† These 98 cases are shifted to the state courts, but remain removable. The cases affected total 477.

Source: Administrative Office of the United States Courts.

LOUISIANA - WEST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	98*	29*	127
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1 †	1	2
3. Resident	Other non resident	Other non resident	26 †	1	27
4. Non res. corp. doing business in state	Resident	Resident	5*	9	14
5. Non res. corp. not doing business in state	Resident	Resident			
6. Other non resident	Resident	Resident	27	3	30
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	6*	1*	7
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident	2 ‡		2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	30		30
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state			
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	7		7
15. Other non resident	Other non resident	Other non resident			
16. Resident	Resident	Resident			
17. Unknown					

These 139 cases are eliminated by S. 1876.

† These 29 cases are shifted to the state courts, but remain removable. The cases affected total 168.

Source: Administrative Office of the United States Courts.

MISSISSIPPI - NORTH

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	16*	17*	33
2. Resident		Non res. corp. not doing business in state	1 †	5	6
3. Resident		Other non resident	14 †	19	33
4. Non res. corp. doing business in state		Resident	17*	3	20
5. Non res. corp. not doing business in state		Resident	5	5	5
6. Other non resident		Resident	48	48	48
7. Non res. corp. doing business in state		Non res. corp. doing business in state			
8. Non res. corp. doing business in state		Non res. corp. not doing business in state	1 †		1
9. Non res. corp. doing business in state		Other non resident	1		1
10. Non res. corp. not doing business in state		Non res. corp. doing business in state	1		1
11. Other non resident		Non res. corp. doing business in state	4	1*	5
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident	1		1
14. Other non resident		Non res. corp. not doing business in state	3	1	4
15. Other non resident		Other non resident			
16. Resident		Resident			
17. Unknown					

* These 51 cases are eliminated by S. 1876.

† These 17 cases are shifted to the state courts, but remain removable. The cases affected total 68.

Source: Administrative Office of the United States Courts.

MISSISSIPPI - SOUTH

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	76*	71*	147
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	7 †	11	18
3. Resident	Other non resident	Other non resident	10 †	36	46
4. Non res. corp. doing business in state	Resident	Resident	28*		28
5. Non res. corp. not doing business in state	Resident	Resident	4		4
6. Other non resident	Resident	Resident	23	1	24
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	7*		7
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state	1 †		1
9. Non res. corp. doing business in state	Other non resident	Other non resident	1 †	1	2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1	2*	3
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	7	2*	9
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	2	3	5
15. Other non resident	Other non resident	Other non resident	4	3	7
16. Resident	Resident	Resident	1*	1	2
17. Unknown					

* These 187 cases are eliminated by S. 1876.

† These 19 cases are shifted to the state courts, but remain removable. The cases affected total 206.

Source: Administrative Office of the United States Courts.

TEXAS - NORTH

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	171*	44*	215
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	17 †	2	19
3. Resident	Other non resident	Other non resident	61 †	9	70
4. Non res. corp. doing business in state	Resident	Resident	60*	1	61
5. Non res. corp. not doing business in state	Resident	Resident	23	1	24
6. Other non resident	Resident	Resident	84	2	86
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	10*	3*	13
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	3 †	2	5
9. Non res. corp. doing business in state	Other non resident	Other non resident	8 †	1	9
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	5		5
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	18	1*	19
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
15. Other non resident	Other non resident	Other non resident	4	3	7
16. Resident	Resident	Resident			
17. Unknown					

* These 289 cases are eliminated by S. 1876.

† These 89 cases are shifted to the state courts, but remain removable. The cases affected total 378.

Source: Administrative Office of the United States Courts.

TEXAS - EAST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	130*	17*	147
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	8 ^p	2	10
3. Resident	Other non resident	Other non resident	14 ^p	1	15
4. Non res. corp. doing business in state	Resident	Resident	16*	1	17
5. Non res. corp. not doing business in state	Resident	Resident	3	1	4
6. Other non resident	Resident	Resident	29	1	30
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1*		1
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state	1 ^p		1
9. Non res. corp. doing business in state	Non res. corp. doing business in state	Other non resident	2 ^p		2
10. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. not doing business in state	Non res. corp. doing business in state	14		14
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident	1		1
16. Resident	Resident	Resident			
17. Unknown					

* These 164 cases are eliminated by S. 1876.

^p These 25 cases are shifted to the state courts, but remain removable. The cases affected total 189.

Source: Administrative Office of the United States Courts.

TEXAS - SOUTH

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	173*	29*	202
2. Resident		Non res. corp. not doing business in state	10 †	3	12
3. Resident		Other non resident	33 †	8	41
4. Non res. corp. doing business in state	Resident		34*	4	38
5. Non res. corp. not doing business in state	Resident		5		5
6. Other non resident	Resident		52		52
7. Non res. corp. doing business in state		Non res. corp. doing business in state	4*	2*	6
8. Non res. corp. doing business in state		Non res. corp. not doing business in state	1 †		1
9. Non res. corp. doing business in state		Other non resident			
10. Non res. corp. not doing business in state		Non res. corp. doing business in state			
11. Other non resident		Non res. corp. doing business in state	6		6
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident	2		2
14. Other non resident		Non res. corp. not doing business in state			
15. Other non resident		Other non resident			
16. Resident		Resident	5*		5
17. Unknown					

* These 247 cases are eliminated by S. 1876.

† These 44 cases are shifted to the state courts, but remain removable. The cases affected total 291.

Source: Administrative Office of the United States Courts.

TEXAS - WEST

Total	Plaintiff	Defendant	Original Removed Total		
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	137*	10*	147
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	8	8	8
3. Resident	Other non resident	Other non resident	65	4	69
4. Non res. corp. doing business in state	Resident	Resident	26*		26
5. Non res. corp. not doing business in state	Resident	Resident	1		1
6. Other non resident	Resident	Resident	89	1	90
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	9		9
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
15. Other non resident	Other non resident	Other non resident	7	1	8
16. Resident	Resident	Resident	1*		1
17. Unknown					

* These 174 cases are eliminated by S. 1876.

† These 73 cases are shifted to the state courts, but remain removable. The cases affected total 247

Source: Administrative Office of the United States Courts.

KENTUCKY - EAST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	17*	18*	35
2. Resident		Non res. corp. not doing business in state	3 †	3	6
3. Resident		Other non resident	21 †	23	44
4. Non res. corp. doing business in state	Resident		13*	1	14
5. Non res. corp. not doing business in state	Resident		1		1
6. Other non resident	Resident		28	4	32
7. Non res. corp. doing business in state	Non res. corp. doing business in state				
8. Non res. corp. doing business in state	Non res. corp. not doing business in state				
9. Non res. corp. doing business in state	Other non resident				
10. Non res. corp. not doing business in state	Non res. corp. doing business in state				
11. Other non resident	Non res. corp. doing business in state		2	2*	4
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state				
13. Non res. corp. not doing business in state	Other non resident				
14. Other non resident	Non res. corp. not doing business in state				
15. Other non resident	Other non resident		6	1	7
16. Resident	Resident				
17. Unknown					

* These 50 cases are eliminated by S. 1876.

† These 24 cases are shifted to the state courts, but remain removable. The cases affected total 74.

Source: Administrative Office of the United States Courts.

KENTUCKY - WEST

Total	Plaintiff	Defendant	Original Removed Total		
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	45*	20*	65
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	5 †	2	7
3. Resident	Other non resident	Other non resident	19 †	21	40
4. Non res. corp. doing business in state	Resident	Resident	19*	1	20
5. Non res. corp. not doing business in state	Resident	Resident	4	4	8
6. Other non resident	Resident	Resident	26	1	27
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1*		1
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1 †		1
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	2	1*	3
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1	1	2
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
15. Other non resident	Other non resident	Other non resident	5	1	6
16. Resident	Resident	Resident			
17. Unknown					

* These 86 cases are eliminated by S. 1876.

† These 25 cases are shifted to the state courts, but remain removable. The cases affected total 111.

Source: Administrative Office of the United States Courts.

MICHIGAN - EAST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	158*	32	190
2. Resident		Non res. corp. not doing business in state	22	3 †	25
3. Resident		Other non resident	95	8 †	103
4. Non res. corp. doing business in state	Resident				
5. Non res. corp. not doing business in state	Resident		59*	2	61
6. Other non resident	Resident		20		20
			129	4	133
7. Non res. corp. doing business in state	Non res. corp. doing business in state		1*	1*	2
8. Non res. corp. doing business in state	Non res. corp. not doing business in state		1†		1
9. Non res. corp. doing business in state	Other non resident		1		1
10. Non res. corp. not doing business in state	Non res. corp. doing business in state		1		1
11. Other non resident	Non res. corp. doing business in state		12	2*	14
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state				
13. Non res. corp. not doing business in state	Other non resident				
14. Other non resident	Non res. corp. not doing business in state		1		1
15. Other non resident	Other non resident		14	1	15
16. Resident		Resident	15*	2	17
17. Unknown					

* These 268 cases are eliminated by S. 1876.

† These 119 cases are shifted to the state courts, but remain removable. The cases affected total 387.

Source: Administrative Office of the United States Courts.

MICHIGAN - WEST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	60*	10*	70
2. Resident		Non res. corp. not doing business in state	13 ^p	3	16
3. Resident		Other non resident	18 ^p	8	26
4. Non res. corp. doing business in state	Resident		5*		5
5. Non res. corp. not doing business in state	Resident		7		7
6. Other non resident	Resident		35	2	37
7. Non res. corp. doing business in state	Non res. corp. doing business in state		1*		1
8. Non res. corp. doing business in state	Non res. corp. not doing business in state			1	1
9. Non res. corp. doing business in state	Other non resident				
10. Non res. corp. not doing business in state	Non res. corp. doing business in state				
11. Other non resident	Non res. corp. doing business in state		4		4
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state				
13. Non res. corp. not doing business in state	Other non resident		1		1
14. Other non resident	Non res. corp. not doing business in state				
15. Other non resident	Other non resident		2		2
16. Resident	Resident		2*		2
17. Unknown					

* These 78 cases are eliminated by S. 1876.

^p These 31 cases are shifted to the state courts, but remain removable. The cases affected total 109.

Source: Administrative Office of the United States Courts.

OHIO - NORTH

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	138*	33*	171
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	31 [†]	3	34
3. Resident	Other non resident	Other non resident	55 [†]	6	61
4. Non res. corp. doing business in state	Resident	Resident	50*	1	51
5. Non res. corp. not doing business in state	Resident	Resident	17		17
6. Other non resident	Resident	Resident	115	3	118
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	6*	2*	8
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state	1 [†]		1
9. Non res. corp. doing business in state	Other non resident	Other non resident	2 [†]		2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	2		2
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	15	5*	20
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	3		3
15. Other non resident	Other non resident	Other non resident	18	3	21
16. Resident	Resident	Resident		1	1
17. Unknown					

* These 234 cases are eliminated by S. 1876.

† These 89 cases are shifted to the state courts, but remain removable. The cases affected total 323.

Source: Administrative Office of the United States Courts.

OHIO - SOUTH

Plaintiff		Defendant		Original		Removed		Total	
Total									
1.	Resident	Non res. corp. doing business in state		106*		15.		121	
2.	Resident	Non res. corp. not doing business in state		14 ⁹		2		16	
3.	Resident	Other non resident		29 ⁹		2		31	
4.	Non res. corp. doing business in state	Resident		18*		18			
5.	Non res. corp. not doing business in state	Resident		2		4		6	
6.	Other non resident	Resident		49		1		50	
7.	Non res. corp. doing business in state	Non res. corp. doing business in state		7*		1*		8	
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state							
9.	Non res. corp. doing business in state	Other non resident		1 ⁹				1	
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state							
11.	Other non resident	Non res. corp. doing business in state		10				10	
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state							
13.	Non res. corp. not doing business in state	Other non resident							
14.	Other non resident	Non res. corp. not doing business in state		4		4		4	
15.	Other non resident	Other non resident		3		4		7	
16.	Resident	Resident							
17.	Unknown								

* These 147 cases are eliminated by S. 1876.

⁹ These 44 cases are shifted to the state courts, but remain removable. The cases affected total 191.

Source: Administrative Office of the United States Courts.

TENNESSEE - EAST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	101*	29*	130
2. Resident		Non res. corp. not doing business in state	21 ^p	11	32
3. Resident		Other non resident	81 ^p	21	102
4. Non res. corp. doing business in state	Resident		11*		11
5. Non res. corp. not doing business in state	Resident		8		8
6. Other non resident	Resident		94	4	98
7. Non res. corp. doing business in state	Non res. corp. doing business in state			2*	2
8. Non res. corp. doing business in state	Non res. corp. not doing business in state		1 ^p	1	2
9. Non res. corp. doing business in state	Other non resident				
10. Non res. corp. not doing business in state	Non res. corp. doing business in state				
11. Other non resident	Non res. corp. doing business in state		15	2*	17
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state				
13. Non res. corp. not doing business in state	Other non resident				
14. Other non resident	Non res. corp. not doing business in state		1		1
15. Other non resident	Other non resident		11		11
16. Resident	Resident		1*		1
17. Unknown					

* These 146 cases are eliminated by S. 1876.

† These 103 cases are shifted to the state courts, but remain removable. The cases affected total 249.

Source: Administrative Office of the United States Courts.

TENNESSEE - MIDDLE

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	13*	8*	21
2. Resident		Non res. corp. not doing business in state	6 [†]	4	10
3. Resident		Other non resident	3 [†]	6	9
4. Non res. corp. doing business in state		Resident	1*		1
5. Non res. corp. not doing business in state		Resident	1		1
6. Other non resident		Resident	7	3	10
7. Non res. corp. doing business in state		Non res. corp. doing business in state			
8. Non res. corp. doing business in state		Non res. corp. not doing business in state	1 [†]		1
9. Non res. corp. doing business in state		Other non resident			
10. Non res. corp. not doing business in state		Non res. corp. doing business in state			
11. Other non resident		Non res. corp. doing business in state	3		3
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident			
14. Other non resident		Non res. corp. not doing business in state			
15. Other non resident		Other non resident			
16. Resident		Resident			
17. Unknown					

* These 22 cases are eliminated by S. 1876.

† These 10 cases are shifted to the state courts, but remain removable. The cases affected total 32.

Source: Administrative Office of the United States Courts.

TENNESSEE - WEST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	47*	8*	55
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	14 ^e	14	14
3. Resident	Other non resident	Other non resident	24 ^f	5	29
4. Non res. corp. doing business in state	Resident	Resident	11*		11
5. Non res. corp. not doing business in state	Resident	Resident	9		9
6. Other non resident	Resident	Resident	53		53
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	3*		3
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident	1 ^p		1
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	7		7
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident	5		5
16. Resident	Resident	Resident	1*	1	2
17. Unknown					

* These 70 cases are eliminated by S. 1876.

^e These 39 cases are shifted to the state courts, but remain removable. The cases affected total 109.

Source: Administrative Office of the United States Courts.

ILLINOIS - NORTH

Plaintiff		Defendant		Original	Removed	Total
Total						
1.	Resident	Non res. corp. doing business in state	169*	23*		192
2.	Resident	Non res. corp. not doing business in state	54 †	2		56
3.	Resident	Other non resident	154 †	5		159
4.	Non res. corp. doing business in state	Resident	120*	2		122
5.	Non res. corp. not doing business in state	Resident	54	2		56
6.	Other non resident	Resident	221	3		224
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	11*			11
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state	10 †			10
9.	Non res. corp. doing business in state	Other non resident	3 †			3
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state	5			5
11.	Other non resident	Non res. corp. doing business in state	22	4*		26
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1			1
13.	Non res. corp. not doing business in state	Other non resident	1	1		2
14.	Other non resident	Non res. corp. not doing business in state	5	1		6
15.	Other non resident	Other non resident	4			4
16.	Resident	Resident	1*			1
17.	Unknown					

* These 328 cases are eliminated by S. 1876.

† These 221 cases are shifted to the state courts, but remain removable. The cases affected total 549.

Source: Administrative Office of the United States Courts.

ILLINOIS - EAST

Plaintiff		Defendant		Original	Removed	Total
Total						
1.	Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	20*	9*	29
2.	Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	6 ^p	16	22
3.	Resident	Other non resident	Other non resident	14 ^p	22	36
4.	Non res. corp. doing business in state	Resident	Resident	11*	11	
5.	Non res. corp. not doing business in state	Resident	Resident	6	6	
6.	Other non resident	Resident	Resident	25	25	
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	2*	1*	3
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
9.	Non res. corp. doing business in state	Other non resident	Other non resident			
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1	1	
11.	Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	1	1	
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13.	Non res. corp. not doing business in state	Other non resident	Other non resident			
14.	Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1	1	
15.	Other non resident	Other non resident	Other non resident	6	1	7
16.	Resident	Resident	Resident		1	1
17.	Unknown					

* These 43 cases are eliminated by S. 1876.

^p These 20 cases are shifted to the state courts, but remain removable. The cases affected total 63.

Source: Administrative Office of the United States Courts.

ILLINOIS - SOUTH

Plaintiff		Defendant		Original		Removed		Total	
Total									
1.	Resident	Non res. corp. doing business in state		18*		12*		30	
2.	Resident	Non res. corp. not doing business in state		10 ^p		8		18	
3.	Resident	Other non resident		7		13		20	
4.	Non res. corp. doing business in state	Resident		11*		2		13	
5.	Non res. corp. not doing business in state	Resident		6		1		7	
6.	Other non resident	Resident		17		1		18	
7.	Non res. corp. doing business in state	Non res. corp. doing business in state		3*		1*		4	
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state							
9.	Non res. corp. doing business in state	Other non resident		4 ^p				4	
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state		2				2	
11.	Other non resident	Non res. corp. doing business in state		2				2	
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state							
13.	Non res. corp. not doing business in state	Other non resident		2				2	
14.	Other non resident	Non res. corp. not doing business in state							
15.	Other non resident	Other non resident		2		1		3	
16.	Resident	Resident		1*		1		2	
17.	Unknown								

These 46 cases are eliminated by S. 1876.

† These 21 cases are shifted to the state courts, but remain removable. The cases affected total 67.

Source: Administrative Office of the United States Courts.

INDIANA - NORTH

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	92*	13*	105
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	32†	2	34
3. Resident	Other non resident	Other non resident	58†	3	61
4. Non res. corp. doing business in state	Resident	Resident	24*		24
5. Non res. corp. not doing business in state	Resident	Resident	16		16
6. Other non resident	Resident	Resident	122		122
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	2*		2
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state	1†		1
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	2		2
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	6		6
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
13. Non res. corp. not doing business in state	Other non resident	Other non resident	1		1
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	5		5
15. Other non resident	Other non resident	Other non resident	14	1	15
16. Resident	Resident	Resident			
17. Unknown					

* These 131 cases are eliminated by S. 1876.

† These 91 cases are shifted to the state courts, but remain removable. The cases affected total 222.

Source: Administrative Office of the United States Courts.

INDIANA - SOUTH

Plaintiff		Defendant		Original		Removed		Total	
Total									
1.	Resident	Non res. corp. doing business in state		106*		25*		131	
2.	Resident	Non res. corp. not doing business in state		44		8		52	
3.	Resident	Other non resident		48		13		61	
4.	Non res. corp. doing business in state	Resident		69*		1		70	
5.	Non res. corp. not doing business in state	Resident		79		1		80	
6.	Other non resident	Resident		107		3		110	
7.	Non res. corp. doing business in state	Non res. corp. doing business in state		4*		4		4	
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state		1		1		1	
9.	Non res. corp. doing business in state	Other non resident							
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state		1		1		1	
11.	Other non resident	Non res. corp. doing business in state		21		2*		23	
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state							
13.	Non res. corp. not doing business in state	Other non resident		1		1		1	
14.	Other non resident	Non res. corp. not doing business in state		3		3		3	
15.	Other non resident	Other non resident		6		6		6	
16.	Resident	Resident		2*		2		2	
17.	Unknown								

These 208 cases are eliminated by S. 1876.

* These 93 cases are shifted to the state courts, but remain removable. The cases affected total 301.

Source: Administrative Office of the United States Courts.

WISCONSIN - EAST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	56*	7*	63
2. Resident		Non res. corp. not doing business in state	6 ⁹	1	7
3. Resident		Other non resident	14 ⁹	1	15
4. Non res. corp. doing business in state	Resident		22*	1	23
5. Non res. corp. not doing business in state	Resident		5		5
6. Other non resident	Resident		26	2	28
7. Non res. corp. doing business in state	Non res. corp. doing business in state		2*		2
8. Non res. corp. doing business in state	Non res. corp. not doing business in state				
9. Non res. corp. doing business in state	Other non resident		2 ⁹		2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state		1		1
11. Other non resident	Non res. corp. doing business in state		7		7
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state				
13. Non res. corp. not doing business in state	Other non resident				
14. Other non resident	Non res. corp. not doing business in state				
15. Other non resident	Other non resident		1		1
16. Resident	Resident				
17. Unknown					

* These 87 cases are eliminated by S. 1876.

⁹ These 22 cases are shifted to the state courts, but remain removable. The cases affected total 109.

Source: Administrative Office of the United States Courts.

WISCONSIN - WEST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	21*	2*	23
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1 †	1	2
3. Resident	Other non resident	Other non resident	8 †	1	9
4. Non res. corp. doing business in state	Resident	Resident	3*	3	
5. Non res. corp. not doing business in state	Resident	Resident	1	1	2
6. Other non resident	Resident	Resident	27	1	28
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	2		2
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident	1		1
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident	3		3
16. Resident	Resident	Resident			
17. Unknown					

* These 26 cases are eliminated by S. 1876.

† These 9 cases are shifted to the state courts, but remain removable. The cases affected total 35.

Source: Administrative Office of the United States Courts.

ARKANSAS - EAST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	88*	99*	187
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state		2	2
3. Resident	Other non resident	Other non resident	15 ^g	4	19
4. Non res. corp. doing business in state	Resident	Resident	28*	1	29
5. Non res. corp. not doing business in state	Resident	Resident			
6. Other non resident	Resident	Resident	1		1
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	14*		14
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state	1 ^p		1
9. Non res. corp. doing business in state	Other non resident	Other non resident	3 ^p		3
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. not doing business in state	Non res. corp. doing business in state			
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	4		4
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident	1	1	2
16. Resident	Resident	Resident	1*	1	2
17. Unknown					

* These 230 cases are eliminated by S. 1876.

^g These 19 cases are shifted to the state courts, but remain removable. The cases affected total 249.

Source: Administrative Office of the United States Courts.

ARKANSAS - WEST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	33*	39*	72
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	4 [†]	1	5
3. Resident	Other non resident	Other non resident	14 [†]	19	33
4. Non res. corp. doing business in state	Resident	Resident	13*	1	14
5. Non res. corp. not doing business in state	Resident	Resident	2		2
6. Other non resident	Resident	Resident	27	1	28
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	2*		2
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state			
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1	2	3
15. Other non resident	Other non resident	Other non resident			
16. Resident	Resident	Resident			
17. Unknown					

* These 87 cases are eliminated by S. 1876.

† These 18 cases are shifted to the state courts, but remain removable. The cases affected total 105.

Source: Administrative Office of the United States Courts.

IOWA - NORTH

Plaintiff		Defendant		Original Removed		Total
1.	Resident	Non res. corp. doing business in state	25*	11*	36	
2.	Resident	Non res. corp. not doing business in state	2 †	2	4	
3.	Resident	Other non resident	8 †	5	13	
4.	Non res. corp. doing business in state	Resident	7*		7	
5.	Non res. corp. not doing business in state	Resident				
6.	Other non resident	Resident	17	1	18	
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	1*		1	
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state				
9.	Non res. corp. doing business in state	Other non resident				
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state				
11.	Other non resident	Non res. corp. doing business in state	1		1	
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state				
13.	Non res. corp. not doing business in state	Other non resident				
14.	Other non resident	Non res. corp. not doing business in state				
15.	Other non resident	Other non resident				
16.	Resident	Resident	1*		1	
17.	Unknown					

* These 45 cases are eliminated by S. 1876.

† These 10 cases are shifted to the state courts, but remain removable. The cases affected total 55.

Source: Administrative Office of the United States Courts.

IOWA - SOUTH

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	25*	19*	44
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	9 ^p	2	11
3. Resident	Other non resident	Other non resident	11 ^p	6	17
4. Non res. corp. doing business in state	Resident	Resident	9*		9
5. Non res. corp. not doing business in state	Resident	Resident	6		6
6. Other non resident	Resident	Resident	23		23
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1*	1*	2
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	2 ^p		2
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state			
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	2		2
15. Other non resident	Other non resident	Other non resident	4	1	5
16. Resident	Resident	Resident			
17. Unknown					

* These 55 cases are eliminated by S. 1876.

† These 22 cases are shifted to the state courts, but remain removable. The cases affected total 77.

Source: Administrative Office of the United States Courts.

MINNESOTA

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	53*	12*	65
2. Resident		Non res. corp. not doing business in state	53†	8	61
3. Resident		Other non resident	49‡	5	54
4. Non res. corp. doing business in state		Resident	12*	1	13
5. Non res. corp. not doing business in state		Resident	34		34
6. Other non resident		Resident	109	1	110
7. Non res. corp. doing business in state		Non res. corp. doing business in state	5*		5
8. Non res. corp. doing business in state		Non res. corp. not doing business in state	1‡		1
9. Non res. corp. doing business in state		Other non resident	2‡		2
10. Non res. corp. not doing business in state		Non res. corp. doing business in state	1		1
11. Other non resident		Non res. corp. doing business in state	6	2*	8
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state	2		2
13. Non res. corp. not doing business in state		Other non resident	1		1
14. Other non resident		Non res. corp. not doing business in state	2		2
15. Other non resident		Other non resident	3		3
16. Resident		Resident	1*		1
17. Unknown					

* These 85 cases are eliminated by S. 1876.

† These 105 cases are shifted to the state courts, but remain removable. The cases affected total 190.

Source: Administrative Office of the United States Courts.

MISSOURI - EAST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	36*	55*	91
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	3 †	3	6
3. Resident	Other non resident	Other non resident	27†	25	52
4. Non res. corp. doing business in state	Resident	Resident	43*	2	45
5. Non res. corp. not doing business in state	Resident	Resident	5	5	5
6. Other non resident	Other non resident	Other non resident	39	1	40
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	11*	5*	16
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1 †		1
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	3	1*	4
12. Non res. corp. not doing business in state	Other non resident	Other non resident			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state		1	1
15. Other non resident	Other non resident	Other non resident	1	5	6
16. Resident	Resident	Resident			
17. Unknown					

These 151 cases are eliminated by S. 1876.

† These 31 cases are shifted to the state courts, but remain removable. The cases affected total 182.

Source: Administrative Office of the United States Courts.

MISSOURI - WEST

Total		Plaintiff	Defendant	Original	Removed	Total
<hr/>						
1.	Resident		Non res. corp. doing business in state	31*	28*	59
2.	Resident		Non res. corp. not doing business in state	3 ^p	2	5
3.	Resident		Other non resident	19 ^p	42	61
<hr/>						
4.	Non res. corp. doing business in state	Resident		44*	1	45
5.	Non res. corp. not doing business in state	Resident		3		3
6.	Other non resident	Resident		60	1	61
<hr/>						
7.	Non res. corp. doing business in state		Non res. corp. doing business in state	2*	3*	5
8.	Non res. corp. doing business in state		Non res. corp. not doing business in state	1 ^p	1	1
9.	Non res. corp. doing business in state		Other non resident	1	1	2
<hr/>						
10.	Non res. corp. not doing business in state		Non res. corp. doing business in state		1*	1
11.	Other non resident		Non res. corp. doing business in state	7	2*	9
12.	Non res. corp. not doing business in state		Non res. corp. not doing business in state			
<hr/>						
13.	Non res. corp. not doing business in state		Other non resident	1		1
14.	Other non resident		Non res. corp. not doing business in state			
15.	Other non resident		Other non resident	2		2
<hr/>						
16.	Resident					
17.	Unknown		Resident			

* These 111 cases are eliminated by S. 1876.

^p These 23 cases are shifted to the state courts, but remain removable. The cases affected total 134.

Source: Administrative Office of the United States Courts.

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	35 *	5 *	40
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	2 †		2
3. Resident	Other non resident	Other non resident	14 †	2	16
4. Non res. corp. doing business in state	Resident	Resident	14 *	1	15
5. Non res. corp. not doing business in state	Resident	Resident			
6. Other non resident	Resident	Resident	58		58
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	3 *		3
8. Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident	2 †		2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1		1
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	4		4
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
15. Other non resident	Other non resident	Other non resident	4		4
16. Resident	Resident	Resident			
17. Unknown					

* These 57 cases are eliminated by S. 1876.

† These 18 cases are shifted to the state courts, but remain removable. The cases affected total 75.

Source: Administrative Office of the United States Courts.

NORTH DAKOTA

Plaintiff		Defendant	Original	Removed	Total
Total					
1.	Resident	Non res. corp. doing business in state	12*	5*	17
2.	Resident	Non res. corp. not doing business in state	1 †		1
3.	Resident	Other non resident	2 †		2
4.	Non res. corp. doing business in state	Resident	5*		5
5.	Non res. corp. not doing business in state	Resident	1		1
6.	Other non resident	Resident	13	1	14
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	1*		1
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9.	Non res. corp. doing business in state	Other non resident			
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state			
11.	Other non resident	Non res. corp. doing business in state	2	3*	5
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13.	Non res. corp. not doing business in state	Other non resident			
14.	Other non resident	Non res. corp. not doing business in state	1		1
15.	Other non resident	Other non resident			
16.	Resident	Resident			
17.	Unknown				

* These 26 cases are eliminated by S. 1876.

† These 3 cases are shifted to the state courts, but remain removable. The cases affected total 29.

Source: Administrative Office of the United States Courts.

SOUTH DAKOTA

Plaintiff		Defendant		Original	Removed	Total
Total						
1.	Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	12*	1*	13
2.	Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	8†	3	11
3.	Resident	Other non resident	Other non resident	6†	2	8
4.	Non res. corp. doing business in state	Resident	Resident	1*		1
5.	Non res. corp. not doing business in state	Resident	Resident	4		4
6.	Other non resident	Resident	Resident	39		39
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
9.	Non res. corp. doing business in state	Other non resident	Other non resident			
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1		1
11.	Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	1		1
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	3		3
13.	Non res. corp. not doing business in state	Other non resident	Other non resident	1		1
14.	Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1	1	
15.	Other non resident	Other non resident	Other non resident	3		3
16.	Resident	Resident	Resident	1*		1
17.	Unknown					

* These 15 cases are eliminated by S. 1876.

† These 14 cases are shifted to the state courts, but remain removable. The cases affected total 29.

Source: Administrative Office of the United States Courts.

ALASKA

Plaintiff		Defendant	Original	Removed	Total
Total					
1.	Resident	Non res. corp. doing business in state	19*	11*	30
2.	Resident	Non res. corp. not doing business in state			
3.	Resident	Other non resident			
4.	Non res. corp. doing business in state	Resident	13*	1	14
5.	Non res. corp. not doing business in state	Resident	2	2	2
6.	Other non resident	Resident	10	10	10
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	2*		2
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9.	Non res. corp. doing business in state	Other non resident			
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state			
11.	Other non resident	Non res. corp. doing business in state	2		2
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13.	Non res. corp. not doing business in state	Other non resident			
14.	Other non resident	Non res. corp. not doing business in state			
15.	Other non resident	Other non resident			
16.	Resident	Resident			
17.	Unknown				

* These 45 cases are eliminated by S. 1876.

† These 0 cases are shifted to the state courts, but remain removable. The cases affected total 45.

Source: Administrative Office of the United States Courts.

ARIZONA

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	31*	33*	64
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	8 †	5	13
3. Resident	Other non resident	Other non resident	22 †	14	36
4. Non res. corp. doing business in state	Resident	Resident	26 ‡	1	27
5. Non res. corp. not doing business in state	Resident	Resident	5	1	6
6. Other non resident	Other non resident	Other non resident	36	3	39
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	5*	2*	7
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state	3 †	1	4
9. Non res. corp. doing business in state	Other non resident	Other non resident	2 †		2
10. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. not doing business in state	Non res. corp. doing business in state	6	1*	7
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
13. Non res. corp. not doing business in state	Other non resident	Other non resident	2		2
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident	4	1	5
16. Resident	Resident	Resident	1*		1
17. Unknown					

* These 99 cases are eliminated by S. 1876.

† These 35 cases are shifted to the state courts, but remain removable. The cases affected total 134.

Source: Administrative Office of the United States Courts.

CALIFORNIA - NORTH

Total		Plaintiff	Defendant	Original	Removed	Total
1.	Resident		Non res. corp. doing business in state	35*	31*	66
2.	Resident		Non res. corp. not doing business in state	21 †	6	27
3.	Resident		Other non resident	13	5	18
4.	Non res. corp. doing business in state	Resident		22*	3	25
5.	Non res. corp. not doing business in state	Resident		14		14
6.	Other non resident	Resident		13		13
7.	Non res. corp. doing business in state		Non res. corp. doing business in state	4*		4
8.	Non res. corp. doing business in state		Non res. corp. not doing business in state	2 †		2
9.	Non res. corp. doing business in state		Other non resident			
10.	Non res. corp. not doing business in state		Non res. corp. doing business in state	3	1*	4
11.	Other non resident		Non res. corp. doing business in state	4		4
12.	Non res. corp. not doing business in state		Non res. corp. not doing business in state	2	1	3
13.	Non res. corp. not doing business in state		Other non resident			
14.	Other non resident		Non res. corp. not doing business in state	2		2
15.	Other non resident		Other non resident			
16.	Resident		Resident	1*		1
17.	Unknown					

* These 94 cases are eliminated by S. 1876.

† These 36 cases are shifted to the state courts, but remain removable. The cases affected total 130.

Source: Administrative Office of the United States Courts.

CALIFORNIA - EAST

Plaintiff		Defendant		Original	Removed	Total
Total						
1.	Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	19*	11*	30
2.	Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1 [†]	1	1
3.	Resident	Other non resident	Other non resident	1 [†]	2	3
4.	Non res. corp. doing business in state	Resident	Resident	6*	2	8
5.	Non res. corp. not doing business in state	Resident	Resident	1	1	1
6.	Other non resident	Resident	Resident	7	7	7
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
9.	Non res. corp. doing business in state	Other non resident	Other non resident	2 [‡]	2	2
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11.	Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state		1*	1
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13.	Non res. corp. not doing business in state	Other non resident	Other non resident			
14.	Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15.	Other non resident	Other non resident	Other non resident			
16.	Resident	Resident	Resident			
17.	Unknown					

* These 37 cases are eliminated by S. 1876.

† These 4 cases are shifted to the state courts, but remain removable. The cases affected total 41.

Source: Administrative Office of the United States Courts.

CALIFORNIA - CENTRAL

Total		Plaintiff	Defendant	Original Removed Total		
1.	Resident		Non res. corp. doing business in state	41*	13*	54
2.	Resident		Non res. corp. not doing business in state	26 [†]	12	38
3.	Resident		Other non resident	15 [†]	3	18
4.	Non res. corp. doing business in state	Resident		13*	2	15
5.	Non res. corp. not doing business in state	Resident		20		20
6.	Other non resident	Resident		41	1	42
7.	Non res. corp. doing business in state		Non res. corp. doing business in state	1*	1*	2
8.	Non res. corp. doing business in state		Non res. corp. not doing business in state	1 [†]		1
9.	Non res. corp. doing business in state		Other non resident	2	1	3
10.	Non res. corp. not doing business in state		Non res. corp. doing business in state	3		3
11.	Other non resident		Non res. corp. doing business in state	12		12
12.	Non res. corp. not doing business in state		Non res. corp. not doing business in state	3		3
13.	Non res. corp. not doing business in state		Other non resident			
14.	Other non resident		Non res. corp. not doing business in state	2		2
15.	Other non resident		Other non resident	2		2
16.	Resident		Resident			
17.	Unknown					

* These 69 cases are eliminated by S. 1876.

† These 44 cases are shifted to the state courts, but remain removable. The cases affected total 113.

Source: Administrative Office of the United States Courts.

CALIFORNIA - SOUTH

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	8*	4*	12
2. Resident		Non res. corp. not doing business in state	3†		3
3. Resident		Other non resident	2‡	1	3
4. Non res. corp. doing business in state		Resident	3*		3
5. Non res. corp. not doing business in state		Resident	1		1
6. Other non resident		Resident	1		1
7. Non res. corp. doing business in state		Non res. corp. doing business in state			
8. Non res. corp. doing business in state		Non res. corp. not doing business in state			
9. Non res. corp. doing business in state		Other non resident			
10. Non res. corp. not doing business in state		Non res. corp. doing business in state			
11. Other non resident		Non res. corp. doing business in state			
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident			
14. Other non resident		Non res. corp. not doing business in state		1	1
15. Other non resident		Other non resident			
16. Resident		Resident			
17. Unknown					

* These 15 cases are eliminated by S. 1876.

¹ These 5 cases are shifted to the state courts, but remain removable. The cases affected total 20.

Source: Administrative Office of the United States Courts.

HAWAII

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	11*		11
2. Resident		Non res. corp. not doing business in state	1 †		1
3. Resident		Other non resident	11 †	4	15
4. Non res. corp. doing business in state	Resident		1*		1
5. Non res. corp. not doing business in state	Resident		7		7
6. Other non resident	Resident		34		34
7. Non res. corp. doing business in state		Non res. corp. doing business in state	1		1
8. Non res. corp. doing business in state		Non res. corp. not doing business in state			
9. Non res. corp. doing business in state		Other non resident			
10. Non res. corp. not doing business in state		Non res. corp. doing business in state			
11. Other non resident		Non res. corp. doing business in state	4		4
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident			
14. Other non resident		Non res. corp. not doing business in state			
15. Other non resident		Other non resident			
16. Resident		Resident	1*		1
17. Unknown					

* These 14 cases are eliminated by S. 1876.

† These 12 cases are shifted to the state courts, but remain removable. The cases affected total 26.

Source: Administrative Office of the United States Courts.

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	7*	12*	19
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state		1	1
3. Resident	Other non resident	Other non resident	9†	3	12
4. Non res. corp. doing business in state	Resident	Resident	6*		6
5. Non res. corp. not doing business in state	Resident	Resident			
6. Other non resident	Resident	Resident	23		23
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident	1†	1	2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	4		4
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident	2		2
16. Resident	Resident	Resident	1*		1
17. Unknown					

These 26 cases are eliminated by S. 1876.

† These 10 cases are shifted to the state courts, but remain removable. The cases affected total 36.

Source: Administrative Office of the United States Courts.

MONTANA

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	17*	8*	25
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	14 ⁹	17	31
3. Resident	Other non resident	Other non resident	7 ⁹	9	16
4. Non res. corp. doing business in state	Resident	Resident	2*		2
5. Non res. corp. not doing business in state	Resident	Resident	3	1	4
6. Other non resident	Resident	Resident	12	1	12
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	3*	1*	4
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	2		2
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident	1	1	
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
15. Other non resident	Other non resident	Other non resident	2	1	3
16. Resident	Resident	Resident			
17. Unknown					

* These 31 cases are eliminated by S. 1876.

⁹ These 21 cases are shifted to the state courts, but remain removable. The cases affected total 52.

Source: Administrative Office of the United States Courts.

NEVADA

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	12*	12*	24
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	4 ^b	1	5
3. Resident	Other non resident	Other non resident	6 ^b	8	14
4. Non res. corp. doing business in state	Resident	Resident	1*	1	2
5. Non res. corp. not doing business in state	Resident	Resident	7	7	7
6. Other non resident	Other non resident	Resident	30	30	30
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident	1 ^b	1	2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. not doing business in state	Non res. corp. doing business in state	1	1	1
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident			
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1	1	2
15. Other non resident	Other non resident	Other non resident	1	2	3
16. Resident	Resident	Resident	1*	1	2
17. Unknown					

* These 20 cases are eliminated by S. 187b.

^b These 11 cases are shifted to the state courts, but remain removable. The cases affected total 37.

Source: Administrative Office of the United States Courts.

OREGON

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	92*	17*	109
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	31 †	4	35
3. Resident	Other non resident	Other non resident	30 †	2	32
4. Non res. corp. doing business in state	Resident	Resident	23*		23
5. Non res. corp. not doing business in state	Resident	Resident	5		5
6. Other non resident	Resident	Resident	37	1	38
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	7*		7
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state	1 †		1
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1		1
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	12		12
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	4		4
13. Non res. corp. not doing business in state	Other non resident	Other non resident	2		2
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	9		9
15. Other non resident	Other non resident	Other non resident	5		5
16. Resident	Resident	Resident	1*	1	2
17. Unknown					

* These 140 cases are eliminated by S. 1876.

† These 62 cases are shifted to the state courts, but remain removable. The cases affected total 202.

Source: Administrative Office of the United States Courts.

WASHINGTON - EAST

Total		Plaintiff	Defendant	Original Removed Total	
1.	Resident		Non res. corp. doing business in state	15*	11*
2.	Resident		Non res. corp. not doing business in state	1†	1
3.	Resident		Other non resident	4	4
4.	Non res. corp. doing business in state	Resident		2*	2
5.	Non res. corp. not doing business in state	Resident		1	1
6.	Other non resident	Resident		5*	1*
7.	Non res. corp. doing business in state		Non res. corp. doing business in state	1†	1
8.	Non res. corp. doing business in state		Non res. corp. not doing business in state	1†	1
9.	Non res. corp. doing business in state		Other non resident		
10.	Non res. corp. not doing business in state		Non res. corp. doing business in state		
11.	Other non resident		Non res. corp. doing business in state		
12.	Non res. corp. not doing business in state		Non res. corp. not doing business in state		
13.	Non res. corp. not doing business in state		Other non resident		
14.	Other non resident		Non res. corp. not doing business in state		
15.	Other non resident		Other non resident		
16.	Resident		Resident		
17.	Unknown				

* These 29 cases are eliminated by S. 1876.

† These 6 cases are shifted to the state courts, but remain removable. The cases affected total 35.

Source: Administrative Office of the United States Courts.

WASHINGTON - WEST

Plaintiff		Defendant		Original		Removed		Total	
Total									
1.	Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	60*	24*	84			
2.	Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1 ^p		1			
3.	Resident	Other non resident	Other non resident	12 ^p	1	13			
4.	Non res. corp. doing business in state	Resident	Resident	27*	1	28			
5.	Non res. corp. not doing business in state	Resident	Resident						
6.	Other non resident	Resident	Resident	9		9			
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	7*	1*	8			
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1 ^p		1			
9.	Non res. corp. doing business in state	Other non resident	Other non resident						
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state						
11.	Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	4	1*	5			
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state						
13.	Non res. corp. not doing business in state	Other non resident	Other non resident						
14.	Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1			
15.	Other non resident	Other non resident	Other non resident	1		1			
16.	Resident	Resident	Resident	1*		1			
17.	Unknown								

* These 121 cases are eliminated by S. 1876.

^p These 14 cases are shifted to the state courts, but remain removable. The cases affected total 135.

Source: Administrative Office of the United States Courts.

COLORADO

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	35*	9*	44
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	6 [†]	6	12
3. Resident	Other non resident	Other non resident	45†	11	56
4. Non res. corp. doing business in state	Resident	Resident	18*	1	19
5. Non res. corp. not doing business in state	Resident	Resident	22		22
6. Other non resident	Resident	Resident	94		94
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1*		1
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state	2 [†]	1	3
9. Non res. corp. doing business in state	Other non resident	Other non resident	2†		2
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	4	1*	5
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
13. Non res. corp. not doing business in state	Other non resident	Other non resident	2		2
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1		1
15. Other non resident	Other non resident	Other non resident	10	1	11
16. Resident	Resident	Resident			
17. Unknown					

* These 64 cases are eliminated by S. 1876.

† These 55 cases are shifted to the state courts, but remain removable. The cases affected total 119.

Source: Administrative Office of the United States Courts.

KANSAS

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	45*	41*	86
2. Resident		Non res. corp. not doing business in state	2 †	4	6
3. Resident		Other non resident	38 †	36	74
4. Non res. corp. doing business in state		Resident	24*		24
5. Non res. corp. not doing business in state		Resident	3		3
6. Other non resident		Resident	64	4	68
7. Non res. corp. doing business in state		Non res. corp. doing business in state	2*	1*	3
8. Non res. corp. doing business in state		Non res. corp. not doing business in state		1	1
9. Non res. corp. doing business in state		Other non resident	4 †	1	5
10. Non res. corp. not doing business in state		Non res. corp. doing business in state	2		2
11. Other non resident		Non res. corp. doing business in state	8	6*	14
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident			
14. Other non resident		Non res. corp. not doing business in state			
15. Other non resident		Other non resident	8	4	12
16. Resident		Resident	1*		1
17. Unknown					

* These 120 cases are eliminated by S. 1876.

† These 44 cases are shifted to the state courts, but remain removable. The cases affected total 164.

Source: Administrative Office of the United States Courts.

NEW MEXICO

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	27*	16*	43
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	2 †	2	2
3. Resident	Other non resident	Other non resident	26 †	13	39
4. Non res. corp. doing business in state	Resident	Resident	24*		24
5. Non res. corp. not doing business in state	Resident	Resident	1	2	3
6. Other non resident	Resident	Resident	36		36
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	6*	1*	7
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident	5 †	1	6
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	1		1
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	6	2*	8
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state	Other non resident	Other non resident	1	1	
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	2		2
15. Other non resident	Other non resident	Other non resident	9	1	10
16. Resident	Resident	Resident	1*	1	2
17. Unknown					

* These 27 cases are eliminated by S. 1876.

† These 33 cases are shifted to the state courts, but remain removable. The cases affected total 110.

Source: Administrative Office of the United States Courts.

OKLAHOMA - NORTH

Total		Plaintiff	Defendant	Original	Removed	Total
1.	Resident		Non res. corp. doing business in state	18*	32*	50
2.	Resident		Non res. corp. not doing business in state	12 †	5	17
3.	Resident		Other non resident	13 †	12	25
4.	Non res. corp. doing business in state	Resident		11*		11
5.	Non res. corp. not doing business in state	Resident		21		21
6.	Other non resident	Resident		13	2	15
7.	Non res. corp. doing business in state		Non res. corp. doing business in state	2*		2
8.	Non res. corp. doing business in state		Non res. corp. not doing business in state			
9.	Non res. corp. doing business in state		Other non resident			
10.	Non res. corp. not doing business in state		Non res. corp. doing business in state	2		2
11.	Other non resident		Non res. corp. doing business in state	1	1*	2
12.	Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13.	Non res. corp. not doing business in state		Other non resident			
14.	Other non resident		Non res. corp. doing business in state	1		1
15.	Other non resident		Other non resident	1		1
16.	Resident		Resident			
17.	Unknown					

* These 64 cases are eliminated by S. 1876.

† These 25 cases are shifted to the state courts, but remain removable. The cases affected total 89.

Source: Administrative Office of the United States Courts.

Plaintiff		Defendant		Original	Removed	Total
Total						
1.	Resident	Non res. corp. doing business in state		16*	19*	35
2.	Resident	Non res. corp. not doing business in state		6†	9	15
3.	Resident	Other non resident				
4.	Non res. corp. doing business in state	Resident		14*	1	15
5.	Non res. corp. not doing business in state	Resident		3	3	3
6.	Other non resident	Resident		10	10	10
7.	Non res. corp. doing business in state	Non res. corp. doing business in state		1*		1
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state				
9.	Non res. corp. doing business in state	Other non resident		1†		1
10.	Non res. corp. not doing business in state	Non res. corp. doing business in state				
11.	Other non resident	Non res. corp. doing business in state		1		1
12.	Non res. corp. not doing business in state	Non res. corp. not doing business in state				
13.	Non res. corp. not doing business in state	Other non resident				
14.	Other non resident	Non res. corp. not doing business in state				
15.	Other non resident	Other non resident		1		1
16.	Resident	Resident				
17.	Unknown					

These 50 cases are eliminated by S. 1876.

† These 7 cases are shifted to the state courts, but remain removable. The cases affected total 57.

Source: Administrative Office of the United States Courts.

OKLAHOMA - WEST

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	65*	32*	97
2. Resident		Non res. corp. not doing business in state	2 ^p		2
3. Resident		Other non resident	30 ^p	20	50
4. Non res. corp. doing business in state		Resident	55*	1	56
5. Non res. corp. not doing business in state		Resident			
6. Other non resident		Resident	50	1	51
7. Non res. corp. doing business in state		Non res. corp. doing business in state	3*	2*	5
8. Non res. corp. doing business in state		Non res. corp. not doing business in state			
9. Non res. corp. doing business in state		Other non resident			
10. Non res. corp. not doing business in state		Non res. corp. doing business in state			
11. Other non resident		Non res. corp. doing business in state	2		2
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident			
14. Other non resident		Non res. corp. not doing business in state			
15. Other non resident		Other non resident	5	1	6
16. Resident		Resident	1*		1
17. Unknown					

* These 158 cases are eliminated by S. 1876.

† These 32 cases are shifted to the state courts, but remain removable. The cases affected total 190.

Source: Administrative Office of the United States Courts.

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident	Non res. corp. doing business in state	Non res. corp. doing business in state	25*	1*	26
2. Resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state	6 †	6	6
3. Resident	Other non resident	Other non resident	26 ‡	26	26
4. Non res. corp. doing business in state	Resident	Resident	8*	8	8
5. Non res. corp. not doing business in state	Resident	Resident	9	1	9
6. Other non resident	Resident	Resident	35	1	36
7. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state	2*	2	2
8. Non res. corp. doing business in state	Non res. corp. doing business in state	Non res. corp. not doing business in state			
9. Non res. corp. doing business in state	Other non resident	Other non resident			
10. Non res. corp. not doing business in state	Non res. corp. doing business in state	Non res. corp. doing business in state			
11. Other non resident	Non res. corp. doing business in state	Non res. corp. doing business in state	6	6	6
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	Non res. corp. not doing business in state	1	1	1
13. Non res. corp. not doing business in state	Other non resident	Other non resident	1	1	1
14. Other non resident	Non res. corp. not doing business in state	Non res. corp. not doing business in state			
15. Other non resident	Other non resident	Other non resident			
16. Resident	Resident	Resident			
17. Unknown					

* These 36 cases are eliminated by S. 1876.

† These 32 cases are shifted to the state courts, but remain removable. The cases affected total 68.

Source: Administrative Office of the United States Courts.

WYOMING

Total	Plaintiff	Defendant	Original	Removed	Total
1. Resident		Non res. corp. doing business in state	10*	1*	11
2. Resident		Non res. corp. not doing business in state	1 †	1	2
3. Resident		Other non resident	5 †	1	6
4. Non res. corp. doing business in state		Resident	5*		5
5. Non res. corp. not doing business in state		Resident			
6. Other non resident		Resident	10	1	11
7. Non res. corp. doing business in state		Non res. corp. doing business in state	3*		3
8. Non res. corp. doing business in state		Non res. corp. not doing business in state	†		
9. Non res. corp. doing business in state		Other non resident	1		1
10. Non res. corp. not doing business in state		Non res. corp. doing business in state			
11. Other non resident		Non res. corp. doing business in state	1		1
12. Non res. corp. not doing business in state		Non res. corp. not doing business in state			
13. Non res. corp. not doing business in state		Other non resident	1		1
14. Other non resident		Non res. corp. not doing business in state			
15. Other non resident		Other non resident	6		6
16. Resident		Resident			
17. Unknown					

* These 19 cases are eliminated by S. 1876.

† These 7 cases are shifted to the state courts, but remain removable. The cases affected total 26.

Source: Administrative Office of the United States Courts.

Calendar Status Study - 1971

State Trial Courts of General Jurisdiction

Personal Injury Jury Cases

August 1, 1971



The Institute of Judicial Administration
40 Washington Square South
New York, N. Y. 10012

ACKNOWLEDGMENTS

The statistical information provided to the Institute of Judicial Administration on which the following report is based is not readily determined by the courts supplying the data. Statistical records kept by the courts must usually be analysed and a good deal of time spent in producing the necessary information.

The Institute is deeply indebted to the judges, court clerks, court administrators and others who have given their valuable time to supply the data and to provide helpful comment and advice.

INSTITUTE OF JUDICIAL ADMINISTRATION

CALENDAR STATUS STUDY - 1971

PERSONAL INJURY JURY CASES

This study is the 19th in a series of reports published annually by the Institute of Judicial Administration since 1953. It is designed to present a comparative picture of delay in personal injury cases tried to jury in the principal trial courts of general jurisdiction in the states and the District of Columbia. The study makes no attempt to present the picture of delay in the federal courts since that information appears in the annual reports of the Administrative Office of the United States Courts.

The state courts from which data were requested include the following:

- (a) those operating in the most populous county of each state (except Louisiana, for reasons stated later);
- (b) those operating in counties having populations of 500,000 or more, according to

the preliminary reports of the 1970 federal census; and

- (c) a few other courts which do not satisfy the above criteria but are considered representative for other reasons.

5 counties in group (a) and 3 in group (b) were unable to supply the data requested for the report.

Consistent with the policy of the past eight years, the Institute's primary concern has been with the elapsed time from the date of service of the answer until the date of trial in a fair sample of jury-tried personal injury cases. The date of service of the answer has been selected as the starting point because it is a feature in the proceeding that is of uniform significance in most courts. Although we have observed that in a small number of jurisdictions, answers are filed only in extraordinary cases, in most states the service of the answer represents the earliest date when the issues are deemed joined. Those courts which operate under rules of practice not requiring an answer have usually assumed an issue date 20 or 30 days after the service of summons.

Attention is called particularly to those jurisdictions whose figures represent time lapse from date case is actually commenced rather than from service of answer to trial, or from notice of readiness to trial. Such figures are not intended to be comparative.

The Institute's staff recognizes that the period between service of the answer and trial may reflect delay which is not attributable to the courts, but to counsel, the parties and many other factors beyond judicial control. While many judges take the view that their responsibility for expediting the trial of cases commences with the filing of the case, others believe that the court has no obligation to move a case on the docket until all pleadings and preliminary proceedings have been completed and one or both parties have formally indicated their readiness for trial. The latter group insists that if the lapse is to be described as delay, it should be computed only from the time when a formal statement of readiness or stipulation for trial has been placed on record. Several of the jurisdictions reporting use such a device to call the court's attention to the

fact that the case is believed to be fully at issue.

In an effort to present an accurate and complete portrayal of current delays in the disposition of personal injury cases tried to juries, the 1971 study has sought to present two groups of data: (1) With the exception of a few jurisdictions, the average period between the service of the answer, or an equivalent date, and the actual commencement of trial is shown in the tabulations. This is the period for which comparable data is available in the largest number of jurisdictions. Also, this is probably the period in which the litigant, whose rights and obligations are at issue, is most interested. (2) In those jurisdictions where a formal statement of readiness is used, the period between the readiness date and the commencement of the trial is also shown. This figure is of particular significance to judges and administrators of the courts reporting the data.

As in the last fourteen years, the study is concerned with personal injury cases tried to juries. The Institute's staff is fully aware that this is a

narrowly limited facet of the broad and complex field of adjudication. The study reflects not calendar status generally, but the aspect which traditionally has received most attention.

In the case of Louisiana, where trial by jury is relatively infrequent in personal injury cases, and where, in any event, the usual incidents of trial by jury are not present, the figures are omitted.

The conclusion for each jurisdiction, with a few indicated exceptions, are derived from the analysis of a sample of cases supplied by each of the courts. The process of sampling involved two steps. (1) Each court was requested to report the total number of personal injury cases actually going to trial by jury during a period of one year ending April 30, 1971. (2) Using the aggregate figure for the year as the universe, the size of the sample was determined according to the following schedule:

<u>Cases tried during year</u>	<u>Size of sample</u>
10 or less	All cases during year
11 to 25	All cases or 17, whichever is less

- v -

26 to 50	26 cases or 65%, whichever is less
51 to 100	37 cases or 50%, whichever is less
101 to 250	50 cases or 36%, whichever is less
251 to 1000	65 cases or 26%, whichever is less
1001 or over	82 cases or 7%, whichever is less

The conclusions based upon samples derived according to the schedule shown probably represent as close an approach to accuracy as is possible in a study of this nature. The cases reported were those last disposed of before May 1, 1971. In a few instances, the officers reporting were unable to conform to the procedure indicated above, and in those cases the conclusions rest on a different basis. Those exceptions are commented upon in the remarks column of the tabulation.

According to figures furnished by 88 of the 91 jurisdictions reporting, it took, in 1971, an average of almost 21.7 months for a personal injury case to reach jury trial after the service of the answer. This figure shows a slight increase from the average figure of 20.7 months reported by 98 jurisdictions last year (1970).

In 55 of the jurisdictions reporting this year (1971) the local rules of practice require that the parties file a statement of readiness for trial at the appropriate time. Until

such statement is filed, the courts do not assume responsibility for moving the case on the docket. The average waiting period from readiness date to trial in 1971 was about 14.6 months. This has decreased slightly from the average figure of about 14.7 months reported by 59 jurisdictions last year (1970).

As in prior years, the current study confirms that there is a relationship between population and calendar congestion, as shown by the tabulation below:

<u>County Population</u>	<u>Jurisdictions Reporting</u>	<u>Average Time in Months Answer to Trial</u>	<u>Range in Months</u>
Over 750,000	33	29.2	11.4 to 61.7
Between 500,000 and 750,000	24	18.2	4.0 to 35.6
Under 500,000	31	15.6	2.2 to 56.3

In 1970, 16 of 95 courts reported a lapse of 2-1/2 years or more between the service of the answer, or an equivalent date, and trial. This current year the number of such courts is 20 out of the 87 reporting this figure. Three of the 91 courts reporting did not give the time lapse from answer to trial as indicated above.

<u>Court and County</u>	<u>Population</u>	<u>From Service of Answer to Trial (Average in Months)</u>
Circuit Court, Cook County (Chicago) Illinois	5,427,237	61.7
Supreme Court, Bronx County (Bronx) New York	1,441,403	61.5

<u>Court and County</u>	<u>Population</u>	<u>From Service of Answer to Trial (Average in Months)</u>
Supreme Court, Rockland County (Rockland) New York	228,897	56.3
Supreme Court, Kings County (Brooklyn) New York	2,562,245	51.9
Supreme Court, New York County (Manhattan) New York	1,509,327	49.9
Supreme Court, Westchester County (White Plains) New York	888,314	49.6
Court of Common Pleas, Phila- delphia County (Philadelphia) Pennsylvania	1,927,863	46.8
Supreme Court, Nassau County (Mineola) New York	1,413,012	43.8
Supreme Court, Queens County (Queens) New York	1,964,147	42.0
Superior Court, Middlesex County (Cambridge) Massachusetts	1,388,129	40.0
Supreme Court, Suffolk County (Riverhead) New York	1,107,786	39.7
County Department, Law Division Municipal Department (Chicago) Illinois	3,322,855	39.0
Superior and County Courts, Hudson County (Jersey City) New Jersey	886,805	35.6
Superior Court, Suffolk County (Boston) Massachusetts	721,152	35.0
Circuit Court, Wayne County (Detroit) Michigan	2,642,348	34.3
Superior Court, Essex County (Lawrence) Massachusetts	631,000	33.5

<u>Court and County</u>	<u>Population</u>	<u>From Service of Answer to Trial (Average in Months)</u>
Superior Court, Norfolk County (Dedham) Massachusetts	605,413	32.0
Court of Common Pleas, Mont- gomery County (Norristown) Pennsylvania	622,376	30.1
Superior Court, Hampden County (Springfield) Massachusetts	453,458	30.0
District Court, Clark County (Las Vegas) Nevada	270,045	30.0

→
We note that the following courts have been added to the above list since last year: Superior and County Courts, Hudson County, New Jersey, from 28.4 months to 35.6 months; Court of Common Pleas, Montgomery County, Pennsylvania, from 22.0 months to 30.1 months; Superior Court, Hampden County, Massachusetts, from 26.0 months to 30.0 months; District Court, Clark County, Nevada, from 25.0 months to 30.0 months.

A total of 25 courts reported average delays of 12 months or less between the answer and trial, which is five more than last year (1970). This figure represents a little less than one-third of the courts included in our study. Of these, 15 are courts situated in counties with populations of under 500,000. Nine are in counties between 500,000 and 750,000, and one is in a county of over 750,000 - Circuit Court, Dade County, Miami, Florida. Courts in counties of over 500,000

in this category are the following:

Court and County	Population	From Service of Answer to Trial (Average in Months)
Circuit Court, Duval County* (Jacksonville) Florida	513,439	4.0
Court of Common Pleas, Delaware County (Media) Pennsylvania	592,200	4.5
District Court, Oklahoma County* (Oklahoma City) Oklahoma	511,377	5.6
District Court, Tarrant County (Fort Worth) Texas	711,387	8.0
Circuit Court, City of St. Louis (St. Louis) Missouri	607,718	8.2
Circuit Court, Pinellas County* (Clearwater) Florida	515,123	8.4
Circuit Court, Multnomah County (Portland) Oregon	547,865	8.8
Court of Common Pleas, Summit County (Akron) Ohio	550,234	8.9
Circuit Court, Shelby County (Memphis) Tennessee	718,777	9.9
Circuit Court, Dade County (Miami) Florida	1,259,176	11.4

The following courts have been added to the above list in

1971: District Court, Tarrant County, Texas, from 14.0 months to 8.0; Circuit Court, City of St. Louis, Missouri, from 18.4 months to 8.2 months; Court of Common Pleas, Summit County, Ohio, from 14.9 months to 8.9 months. Missing in 1971 from our 1970 list of courts in this category is Circuit Court, Jefferson County, Kentucky which last year gave us a figure of 10.9, while this year's figure is 12.6 months.

*The counties maintained their low averages despite population increases to over 500,000.

In considering the data recorded in the present study, the reader should be aware of the following factors:

(1) The figures have been furnished by the courts themselves. It would be infeasible for the Institute to look behind all the figures reported by its sources. Such investigation would call for on-the-spot studies of about one hundred courts, the cost of which would be beyond the resources of the Institute.

(2) The figures for each court are an average of a representative sample of personal injury cases tried to jury verdict prior to May 1, 1971. While absolute accuracy should be our goal, its attainment is not likely within the limitations of our resources. Nevertheless, the method employed for sampling the cases in the several jurisdictions explained heretofore, in the view of the Institute staff, provides the basis for reasonably valid conclusions.

The Institute observes that a few calculations include some cases unduly aged for reasons obviously beyond control while others apparently exclude such cases in their calculations.

(3) We wish to reaffirm the fact that our study, limited as it is to jury-tried personal injury cases, is not intended to be a picture of general calendar congestion. We recognize that a great deal of the work of the courts is excluded from our report - i.e., criminal cases, divorce cases, commercial cases and non-jury cases generally. No generalization on the entire

status of a court's calendar can or should be drawn from our study.

(4) The delays reflected in the study are not solely within the control of the courts. Often cases are not made ready for trial by counsel within a reasonable time, and often numerous adjournments are granted at the request of counsel.

(5) An increasing number of jurisdictions report that criminal cases are being assigned to judges who customarily try only civil cases, or that civil trials are being suspended in favor of criminal trials. Thus, trials in civil cases are increasingly delayed in some jurisdictions.

(6) We have updated population figures with the preliminary reports of the 1970 census. These figures are, however, subject to revision in the final reports of the Bureau of the Census.

POPULATION FIGURES
COUNTIES & CITIES: U. S. Bureau of the Census, 1970 Census of Population, Preliminary
 Reports (1970-1971)

INSTITUTE OF JUDICIAL ADMINISTRATION
 CALENDAR STATUS STUDY - 1971
 PERSONAL INJURY JURY CASES

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY, AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)			
				SERVICE OF AN- SWER TO TRIAL 1971	READY DA'E TO TRIAL 1970 1971	1970 1971	
ALABAMA	Circuit Court, Jefferson County (639,461)	Birmingham (297,364)	Data not furn- ished in 1971	--	23.7	--	23.7
ALASKA	Superior Court, Third Judicial District (131,688)	Anchorage (46,137)		17.0	--	--	--
ARIZONA	Superior Court, Mari- copa County (963,132)	Phoenix (580,275)		21.7	15.7	12.1	13.7
ARKANSAS	Circuit Court, Pulaski County (279,691)	Little Rock (128,880)		12.1	12.3	--	--

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY, AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)			
				SERVICE OF AN- SWER TO TRIAL 1971	READY DATE TO TRIAL 1970	TO TRIAL 1971	TO TRIAL 1970
CALIFORNIA	Superior Court, Los Angeles County (6,974,103)	Los Angeles (2,781,829)		24.3	23.7	16.4	18.2
	Superior Court, San Diego County (1,318,022)	San Diego (675,790)		26.6	18.3	14.2	12.0
	Superior Court, Alameda County (1,059,051)	Oakland (358,486)		27.1	28.0	13.4	14.6
	Superior Court, San Francisco, City and County (704,217)	San Francisco (704,217)	Data not furnished in 1971	25.0	--	--	23.0
	Superior Court, Orange County (1,409,335)	Santa Ana (154,640)		22.0	23.6	16.7	14.3
	Superior Court, Santa Clara County (1,057,032)	San Jose (436,965)		12.9	15.2	7.8	7.6
	Superior Court, San Bernardino County (672,163)	San Bernardino (106,676)		22.0	18.7	11.0	9.4
	Superior Court, Sacramento County (636,137)	Sacramento (257,860)	Date of filing of at issue memo used instead of date of readiness for trial	18.5	20.8	12.7	9.8

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY, AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)			
				SERVICE OF AN- SWER TO TRIAL	READY DATE TO TRIAL	1970	1971
COLORADO	District Court, Denver City and County (512,691)	Denver (512,691)		12.3	15.7	--	--
	Superior Court, Hartford County (808,246)	Hartford (155,868)		16.2	15.2	15.0	13.7
	Superior Court, New Haven County (733,846)	New Haven (133,543)		24.8	24.6	23.1	22.6
CONNECTICUT	Superior Court, Fairfield County (785,603)	Fairfield Bridgeport (155,359)		21.3	17.0	19.8	14.5
	Superior Court, New Castle County (386,215)	Wilmington (79,978)		12.0	11.8	1.5	1.9
	Circuit Court, Dade County (1,259,176)	Miami (331,553)		11.4	9.6	8.7	6.9
FLORIDA	Circuit Court, Pinellas County (515,123)	Clearwater (50,787)		8.4	10.3	3.2	2.9
	Circuit Court, Duval County (513,439)	Jacksonville (513,439)		4.0	2.7	2.0	1.5
	Circuit Court, Hills- borough County (486,490)	Tampa (274,359)		10.7	10.0	4.6	2.0

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY, AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)			
				SERVICE OF AN- SWER TO TRIAL 1971	READY DATE TO TRIAL 1970	TO TRIAL 1971	1970
HAWAII	Circuit Court, Honolulu County (613,114)	Honolulu (319,784)		19.7	20.4	7.8	10.9
IDAHO	District Court, Ada County (109,393)	Boise (73,330)		6.8	5.8	--	4.2
ILLINOIS	Circuit Court, Cook County (5,427,237) County Department, Law Division Municipal Department	Chicago (3,322,855)	Based on all law jury cases reaching ver- dict. Period shown is from date of filing of case to date of ver- dict	61.7	60.7	--	--
INDIANA	Superior Court, St. Joseph County (243,251)	South Bend (122,797)		15.5	13.7	--	--
IOWA	District Court, Polk County (286,101)	Des Moines (200,587)		12.8	15.1	5.2	6.3
KANSAS	District Court, Sedgwick County (347,939)	Wichita (274,448)		7.5	6.3	--	--
	District Court, Wyan- dotte County (185,219)	Kansas City (166,682)		26.9	24.9	7.0	14.4

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY, AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)			
				SERVICE OF AN- SWER TO TRIAL	READY DATE TO TRIAL	1971	1970
KENTUCKY	Circuit Court, Jefferson County (688,774)	Louisville (356,982)		12.6	10.9	11.7	9.9
MAINE	Superior Court, Cumber- land County (190,007)	Portland (64,304)		11.0	10.0	--	--
MARYLAND	Common Law Courts, Baltimore, City of (895,222)	Baltimore (895,222)	Time lapse is 20.5 computed from date case is placed on docket, normal- ly after filing of answer	20.5	23.8	--	--
MASSACHU- SETTS	Superior Court, Middle- sex County (1,388,129)	Cambridge (98,942)	Time intervals 40.0 are based on time from fil- ing to trial of all civil jury cases	40.0	42.0	--	--
	Superior Court, Suffolk County (721,152)	Boston (628,215)	"	35.0	39.0	--	--
	Superior Court, Worces- ter County (633,785)	Worcester (175,140)	"	21.0	22.0	--	--
	Superior Court, Essex County (631,000)	Lawrence (66,216)	"	33.5	35.0	--	--

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)		
				SERVICE OF AN- SWER TO TRIAL	READY DATE TO TRIAL	
				1971	1970	1971 1970
MASSACHU- SETTS (Cont'd)	Superior Court, Norfolk County (605,413)	Dedham (27,233)	Time intervals are based on time from fil- ing to trial of all civil jury cases.	32.0	30.0	-- --
MICHIGAN	Superior Court, Hampden County (453,458)	Springfield (162,078)	"	30.0	26.0	-- --
	Circuit Court, Wayne County (2,642,348)	Detroit (1,492,914)		34.3	35.4	-- 14.2
	Circuit Court, Oakland County (900,691)	Pontiac (84,951)		22.0	--	20.7 13.9
	Circuit Court, Genesee County (441,666)	Flint (193,571)		12.8	--	6.4 6.2
	Circuit Court, Kent County (408,234)	Grand Rapids (195,892)		19.0	12.9	9.8 4.7
MINNESOTA	District Court, Hennepin County (955,617)	Minneapolis (431,977)	Time is figur- ed from note of issue rather than service of answer	21.4	24.5	13.6 15.3

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)			
				SERVICE OF AN- SWER TO TRIAL	READY DATE TO TRIAL	1971	1970
MISSOURI	Circuit Court, St. Louis, City of (607,718)	St. Louis (607,718)	1971 data 25% of sample re- quested	8.2	18.4	13.3	--
	Circuit Court, St. Louis County (956,196)	Clayton (16,124)		26.9	23.7	4.2	14.0
	Circuit Court, Jackson County (644,947)	Kansas City (495,405)	Data not fur- nished in 1971	--	22.5	--	--
MONTANA	District Court, Yellow- stone County (86,109)	Billings (60,549)	Data not fur- nished in 1971	--	19.6	--	19.2
NEBRASKA	District Court, Douglas County (387,218)	Omaha (327,789)		14.1	10.3	11.3	7.9
NEVADA	District Court, Clark County (270,045)	Las Vegas (124,161)		30.0	25.0	10.4	13.5
NEW HAMPSHIRE	Superior Court, Hills- borough County (221,576)	Manchester (87,342)		--	--	3.0	3.2
NEW JERSEY	Superior and County Courts, Essex County (927,965)	Newark (378,222)		28.7	29.3	--	--

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)		
				SERVICE OF AN- SWER TO TRIAL 1971	READY DATE TO TRIAL 1970	1971 1970
NEW JERSEY (Cont'd)	Superior and County Courts, Bergen County (886,805)	Hackensack (35,234)		15.6	17.7	-- --
	Superior and County Courts, Hudson County (597,091)	Jersey City (253,467)		35.6	28.4	
	Superior and County Courts, Union County (539,207)	Elizabeth (111,414)		28.2	18.6	-- --
	Superior and County Courts, Mercer County (299,919)	Trenton (102,211)		27.0	26.9	
NEW MEXICO	District Court, Berna- lillo County (313,829)	Albuquerque (242,411)		17.5	14.4	-- --
NEW YORK	Supreme Court, Kings County (2,562,245)	Brooklyn (2,562,245)	For all coun- ties in New York time lapses are from issued joined to trial and from notice of trial to trial	51.9	46.9	36.3 32.1

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)		
				SERVICE OF AN- SWER TO TRIAL	READY DATE TO TRIAL	
				1971	1970	1971 1970
NEW YORK (Cont'd)	Supreme Court, Queens County (1,964,147)	Queens (1,964,147)		42.0	49.3	27.7 34.2
	Supreme Court, New York County (1,509,327)	New York (1,509,327)		49.9	48.3	35.3 34.8
	Supreme Court, Bronx County (1,441,403)	Bronx (1,441,403)		61.5	58.1	46.3 44.7
	Supreme Court, Nassau County (1,413,012)	Mineola (21,680)		43.8	45.5	29.2 31.3
	Supreme Court, Erie County (1,103,413)	Buffalo (457,814)		28.5	26.9	14.6 14.0
	Supreme Court, West- chester County (888,314)	White Plains (50,220)		49.6	47.9	37.8 34.4
	Supreme Court, Suffolk County (1,107,786)	Riverhead		39.7	37.1	27.8 24.3
	Supreme Court, Monroe County (706,644)	Rochester (293,695)		26.5	21.7	19.8 17.5

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY, AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)			
				SERVICE OF AN- SWER TO TRIAL 1971	READY DATE TO TRIAL 1970	READY DATE TO TRIAL 1971	
NEW YORK (Con't)	Supreme Court, Onondaga County (466,334)	Syracuse (192,529)		28.4	25.5	18.8	18.0
	Supreme Court, Rockland County (228,897)	New City --		56.3	64.6	42 9	52.2
NORTH CAROLINA	District Court, Guilford County (283,182)	Greensboro (140,672)		6.8	5.9	--	--
	District Court, Cass County (72,710)	Fargo (52,697)		5.7	6.5	--	--
OHIO	Court of Common Pleas, Cuyahoga County (1,701,640)	Cleveland (738,956)	Data not fur- nished in 1971	--	27.8	--	10.8
	Court of Common Pleas, Franklin County (822,336)	Columbus (533,418)		--	--	9.0	6.3
	Court of Common Pleas, Summit County (550,234)	Akron (273,266)		8.9	14.9	7.8	7.8
	Court of Common Pleas, Lucas County (478,966)	Toledo (379,104)		--	13.8	9.5	--

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)			
				SERVICE OF AN- SWER TO TRIAL	READY DATE TO TRIAL	1970	1971
OKLAHOMA	District Court, Oklahoma County (511, 377)	Oklahoma City (363, 225)		5.6	5.1	--	--
	District Court, Tulsa County (397, 398)	Tulsa (328, 219)		10.0	10.7	3.0	--
	Circuit Court, Multnomah County (547, 865)	Portland (375, 161)		8.8	3.5	--	--
PENNSYLVANIA	Court of Common Pleas, Allegheny County (1, 591, 270)	Pittsburgh (512, 789)	In addition to 22.8 the figures that appear for 1970 and 1971 which were fur- nished pursuant to the instruct- ions of the In- stitute, the Ad- ministrator of this court reports that in 1970 the actual average time as determin- ed by data process- ing to process <u>all</u> disposed cases (5,534) was 16.6 mos.	22.3	--	--	---

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)			
				SERVICE OF AN- SWER TO TRIAL	READY DATE TO TRIAL	1970	1970
PENNSYLVANIA (Cont'd)	Court of Common Pleas, Philadelphia County (1,927,863)	Philadelphia (1,927,863)	Answer date and readiness date are the same	46.8	47.7	46.8	47.7
	Court of Common Pleas, Delaware County (592,200)	Media (6,352)	Figures based on order for pre- trial conference to trial and fil- ing of preconfere- nce report to trial rather than from answer to trial and note of readiness to trial	4.5	4.3	2.4	2.1
	Court of Common Pleas, Montgomery County (622,376)	Norristown (38,310)	Figures based on service of answer or entry of appearance to trial; time lapse from certificate of readiness by judge to trial for 1970 is 4 mos.	30.1	22.0	5.7	15.0

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)			
				SERVICE OF AN- SWER TO TRIAL	READY DATE TO TRIAL	1971	1970
PENNSYLVANIA (Cont'd)	Court of Common Pleas, Lackawanna County (231,433)	Scranton (102,294)	Dates of service of answer and readiness for trial are given as same for 1970. Data not furnished in 1971	--	--	6.2	6.2
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SOUTH CAROLINA							
	Court of Common Pleas, Lehigh County (253,057)	Allentown (108,926)	Data not furnished in 1971	--	--	3.7	3.7
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SOUTH DAKOTA							
	Circuit Court, Charleston County (230,256)	Charleston (64,591)		9.8	9.2	12.6	13.4
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TENNESSEE							
	Circuit Court, Shelby County (718,777)	Memphis (620,873)	In most Tennessee courts when plea or answer is filed, case is considered ready for trial	--	--	5.2	--
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				9.9	7.6		

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)			
				SERVICE OF AN - READY DATE SWER TO TRIAL		TO TRIAL	
				1971	1970	1971	1970
TENNESSEE (Cont'd)	Circuit Court, Knox County (270,288)	Knoxville (169,766)		6.0	5.3	--	--
	Circuit Court, Hamilton County (242,782)	Chattanooga (113,003)		5.3	6.2	3.2	3.5
TEXAS	District Court, Dallas County (1,316,289)	Dallas (836,121)		15.6	15.4	--	--
	District Court, Bexar County (830,656)	San Antonio (650,188)		12.8	12.8	10.9	11.4
	District Court, Tarrant County (711,387)	Fort Worth (388,123)		8.0	14.0	--	--
	District Court, El Paso County (347,103)	El Paso (317,462)		24.3	20.6	--	--
VERMONT	County Court, Windsor County (43,716)	Woodstock (2,604)	Based on only one case tried before jury	9.0	15.2		

STATE	TRIAL COURT OF GENERAL JURISDICTION, COUNTY, AND COUNTY POPULATION	CITY AND POPULATION	REMARKS	AVERAGE TIME (MONTHS)			
				SERVICE OF AN- SWER TO TRIAL 1971	READY DATE TO TRIAL 1970	READY DATE TO TRIAL 1971	READY DATE TO TRIAL 1970
VIRGINIA	Law and Equity Court, Richmond, City of (248,074)	Richmond (248,074)		--	7.7	9.0	--
WASHINGTON	Superior Court, King County (1,142,488)	Seattle (524,263)		14.0	14.1	12.5	13.1
	Superior Court, Spokane County (283,077)	Spokane (168,654)		2.2	2.9	1.6	1.4
WEST VIRGINIA	Court of Common Pleas, Kanawha County (224,054)	Charleston (69,531)		16.5	17.2	13.0	15.0
WISCONSIN	Circuit Court, Milwaukee County (1,046,268)	Milwaukee (709,537)		17.8	19.7	12.3	14.3
WYOMING	District Court, Natrona County (51,039)	Casper (39,145)		11.0	--	--	--
DISTRICT OF COLUMBIA	U. S. District Court, District of Columbia (746,169)	Washington (746,169)	Based on time lapse between issue date and start of trial	19.1	19.4	--	8.6

AppendixCOURTS OF LIMITED JURISDICTION AND
THEIR SIGNIFICANCE TO THIS STUDY

The existence within the county of a court of limited jurisdiction which concurrently processes personal injury cases is relevant to the status of the personal injury calendar of the court of general jurisdiction within the county. The cases handled by the court of limited jurisdiction usually involve smaller claims, less complex issues, less extensive pretrial proceedings and less reason for delay. The more serious and complex cases, requiring more investigation and more deliberate procedures, remain for the courts of general jurisdiction. The obvious result is that the average period required to dispose of those cases handled by the court of general jurisdiction is greater than would be the case if that court were handling the easy as well as the difficult cases. Consequently, the courts covered by this year's study were requested to report whether a court of limited jurisdiction within the county also handles personal injury cases. This information is shown hereafter.

State	County	Jurisdictional Limit
Alabama	Jefferson	\$3,000 (Civil Court)
California	All counties reporting	5,000 (Municipal Court)
Colorado	Denver	500 (County Court) 500-2,500 (Superior Court)
Delaware	New Castle	2,500 (Common Pleas Court)
Florida	Dade	5,000 (Civil Court of Record)
	Duval	1,000 (Small Claims Court)
	Hillsborough	1,500 (Civil Court of Record)
	Pinellas	5,000 (Civil and Criminal Court of Record) 500 (Small Claims Court)
Indiana	St. Joseph	500 (Justice of the Peace)
Iowa	Polk	2,000 (Municipal Court, City of Des Moines)
Kansas	Wyandotte	3,000 (Magistrate Court)
Kentucky	Jefferson	500 (Magistrate and Quaterly Courts)
Maine	Cumberland	10,000 (District Court)
Maryland	Baltimore City	2,500 (People's Court)
Michigan	Genesee Kent Oakland	3,000 (District Court)
	Wayne	10,000 (Common Pleas Court) 3,000 (District and Municipal Courts)

<u>State</u>	<u>County</u>	<u>Jurisdictional Limit</u>
Minnesota	Hennepin	\$ 6,000 (Municipal Court)
Missouri	St. Louis City	3,500 (Magistrate Court)
	St. Louis	2,000 (Magistrate Court)
Nevada	Clark	300 (Justice Court)
New Hampshire	Hillsborough	1,500 (District Court)
New Jersey	All counties reporting	3,000 (County District Courts)
New Mexico	Bernalillo	2,000 (Small Claims Court)
New York	Kings, Queens, New York, Bronx	10,000 (Civil Court)
	Nassau, Suffolk	10,000 (County Court) 6,000 (District Court)
	Erie, Monroe	10,000 (County Court)
	Westchester	10,000 (County Court) 6,000 (City Court) 1,000 (Justice of the Peace)
	Onondaga	6,000 (City Court, Syracuse)
	Rockland	10,000 (County Court)
North Carolina	Guilford	5,000 (District Court Division)
North Dakota	Cass	1,000 (County Court)
Ohio	Cuyahoga	10,000 (Municipal Court)
	Franklin	7,500 (Municipal Court of Columbus)
	Summit	5,000 (Akron Municipal Court)

State	County	Jurisdictional Limit
	Lucas	5,000 (Toledo Municipal Court) 3,000 (Oregon-Maumee and Sylvania Municipal Courts)
Oklahoma	Oklahoma, Tulsa	District Court under \$2,500
Oregon	Multnomah	2,500 (District Court)
Pennsylvania	Philadelphia	500 (Municipal Court) 10,000 (Compulsory Arbitration)
	Allegheny	3,000 (Compulsory Arbitration)
	Delaware	3,000 (Compulsory Arbitration)
	Lehigh	
	Montgomery	
South Carolina	Charleston	12,000 (County Court)
Tennessee	All counties reporting	3,000 (General Sessions Court) 3,500 (Shelby)
Texas	Dallas, Tarrant	500 (County Courts at Law; up to 1,000 concurrent with District Court)
Vermont	Windsor	5,000 (Vermont District Court Unit #6)
Virginia	Norfolk	3,000 (Civil Justice Court)
Washington	Richmond	3,000 (Civil Court)
	King	1,000 (District Justice Courts)
West Virginia	Kanawha	500,000 (Division I and II Court of Common Pleas)

<u>State</u>	<u>County</u>	<u>Jurisdictional Limit</u>
Wisconsin	Milwaukee	\$100,000 (County Court)
Wyoming	Natrona	200 (Justice of the Peace)
District of Columbia		50,000 (Superior Court)

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